

1992

Burns Chiropractic Clinic v. Allstate Insurance Company : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 920282 IN THE UTAH COURT OF APPEALS

BURNS CHIROPRACTIC CLINIC,)	BRIEF OF THE APPELLEE
)	
Plaintiff and Appellant,)	
)	
vs.)	Appellate Court No. 920282
)	
ALLSTATE INSURANCE COMPANY,)	
)	
Defendant and Appellee.)	

BRIEF OF APPELLEE

- - - - -

APPEAL FROM FINAL ORDER GRANTING
APPELLEE'S MOTION TO DISMISS
ISSUED BY JUDGE SHEILA A. MCCLEVE,
THIRD CIRCUIT COURT OF SALT LAKE COUNTY,
STATE OF UTAH.

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Priority Classification No. 16

SEP 24 1992

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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

The Appellant has filed this appeal from an Order issued by the Honorable Sheila K. McCleve, Judge of the Third Circuit Court, State of Utah, Salt Lake County, Salt Lake Department, granting Allstate Insurance Company's Motion to Dismiss Appellant's complaint.

This Court has jurisdiction to hear this appeal, pursuant to Utah Code Ann. §78-2a-3(2)(d) (1953 as amended).

STATEMENT OF THE ISSUES PRESENTED

AND STANDARD OF APPELLATE REVIEW

The lower court dismissed Appellant's complaint for two reasons; namely: (1) Appellant failed to state a claim for relief; and (2) Appellant failed to specify facts sufficient in its complaint to establish subject matter jurisdiction. The lower court also awarded attorney's

fees to Allstate Insurance Company, appellee, hereinafter referred to as Allstate, on the basis the action was brought without merit and in bad faith. The issues which this court should, therefore, address are as follows:

1. Did the lower court correctly rule that appellant's complaint failed to state a claim for relief in that an assignee, such as appellant, cannot acquire or unilaterally assert greater rights against Allstate than its insured can assert against Allstate?

2. Did the lower court correctly rule that appellant's complaint was defective and did not establish subject matter jurisdiction in that it failed to specify sufficient facts to establish subject matter jurisdiction, including facts as to execution, delivery and place, and the notary certificate was left blank.

3. Did the lower court correctly rule that appellant's response memorandum and letter were untimely filed further giving the lower court authority to dismiss appellant's complaint?

4. Did the lower court correctly rule that the action brought by appellant was without merit and not in good faith particularly when a medical panel was available, pursuant to statute, to resolve the matter of the reasonableness of medical expenses and the necessity of medical services, which appellant does not deny; and that the Second Circuit had previously ruled against Appellant on the same issue and resolved the matter in favor of Allstate and awarded attorney's fees?

The standard for review on these issues is whether the lower court correctly applied the law and whether any material fact exists which would prevent this court from upholding the Order of the lower

court and granting Allstate judgment as a matter of law. Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

Allstate disputes appellant's statement of the issues on the basis the lower court did not dismiss appellant's complaint for failure to submit the reasonableness of medical expenses and the necessity of medical services to an impartial medical panel. The lower court found the appellant's failure to submit those issues to a medical panel was one of the reasons for awarding attorney's fees against appellant.

Allstate further disputes appellant's statement of the issue as to whether benefits of an automobile personal injury protection insurance are assignable. The lower court specifically found the contract between Allstate and its insured allows an insured to assign payment of reasonable and necessary medical expenses. However, the lower court did not allow the appellant to magically acquire greater rights in the insurance contract between Allstate and its insured than the insured had bargained for.

GOVERNING STATUTES AND RULES

Copies of the following statutes and Court Rules cited herein are included in the Addendum to this Brief:

1. Utah Code Ann. §31A-22-307 (1985 as amended).
2. Utah Code Ann. §78-2a-3(2)(d) (1953 as amended).
3. Utah Code Ann. §78-27-56 (1953 as amended).
4. Utah Rules of Civil Procedure, Rule 11.
5. Utah Rules of Appellate Procedure, Rule 33.
6. Utah Rules of Judicial Administration, Rule 4-501.

STATEMENT OF THE CASE

A. Nature of the Case

The appellant, Burns Chiropractic Clinic, filed suit against Allstate Insurance Company for payment of health care services it rendered to Kelly Bailey, an insured of Allstate. (R. 1-2). The appellant did not sue Kelly Bailey, the individual who received the services. Instead, the appellant sued Allstate alleging an assignment from Kelly Bailey to appellant allowed it to sue Allstate directly. (R. 1-2). Allstate has no contractual relationship directly with appellant. (R. 7, 17).

Allstate had a personal contract of insurance with Kelly Bailey. The bargained for contract lists several rights and duties of both parties to the contract. Specifically under the personal injury protection portion of the policy, Kelly Bailey had the right to receive certain benefits, including the right to receive payment for "all reasonable and necessary expenses." (R. 20, p. 11). Along with that right, Kelly Bailey had the duty to not incur expenses which were unreasonable or undergo medical treatment which was unnecessary. If she did incur unreasonable expenses, Allstate had the right to refuse to pay for those expenses. If she was sued for payment of those expenses, Allstate had the duty to defend and pay the defense costs associated with said suit. These rights and duties could not be transferred to another entity. (R. 20, p. 2).

Appellant has alleged, however, that because of the assignment between Kelly Bailey and itself, appellant now has greater rights under the contract of insurance between Allstate and Kelly Bailey and can assert a right to sue Allstate directly, a right not even granted to

Kelly Bailey, for medical expenses Allstate determines are unreasonable or unnecessary.

B. Course of the Proceedings

On February 13, 1992, the Honorable K. Roger Bean, issued a memorandum of decision, in the Second Circuit Court, State of Utah, Davis County, Layton Department, in the case of Burns Chiropractic Care v. Michael Nunes and Allstate Insurance, Civil No. 914000383. In that case, appellant had filed suit against Allstate, directly, for failure to pay the bill of the person, an Allstate insured, who had received the chiropractic treatment. An assignment had also been made from the person who received the treatment to appellant. The court ordered that the action was not brought in good faith and was without merit. (R. 49, 50; Addendum 8).

On January 16, 1992, Allstate was served through its registered agent, Michael Nunes, a copy of the complaint in this action. (R. 4). On February 10, 1992, a Motion to Dismiss and Request for Hearing was filed with the court along with a Memorandum in Support of the Motion to Dismiss and an Affidavit of Clark F. Ulrich. (R. 5-20).

The lower court, pursuant to Allstate's request for hearing, scheduled a hearing on Allstate's Motion to Dismiss pursuant to Notice sent to both counsel on February 24, 1992. The hearing was scheduled for March 11, 1992, at 10 a.m. (R. 21).

On March 10, 1992, a memorandum in opposition to Allstate's Motion to Dismiss was filed by appellant. (R. 22). A copy of that memorandum was not received in Allstate's counsel's office until after the hearing. The memorandum was mailed to counsel for Allstate on the 10th of March, 1992, from Salt Lake to Logan. (R. 24). A copy of the

memorandum was given to counsel for Allstate in the middle of the hearing on Wednesday, March 11, 1992. (R.37).

Prior to the hearing on March 11, 1992, Allstate had never received a copy of the claimed assignment from Kelly Bailey, Allstate's insured, to Burns, appellant. (R. 37). While a copy of an Affidavit of Brian Burns appears in the court file regarding the Assignment, the affidavit was not served upon opposing counsel (and does not purport to have been inasmuch as no mailing certificate is included). (R. 32-34).

The court allowed Allstate to respond to the untimely memorandum while reserving Allstate's oral motion to strike the memorandum as being untimely. In the meantime, counsel for appellant sent a personal letter to Judge McCleve raising additional arguments. (R. 51). Allstate filed a reply memorandum, renewed its motion to strike the memorandum and the ex parte non pleading letter of Burns to Judge McCleve and an additional affidavit of Clark Ulrich in support of its Motion. (R. 37-48).

C. Disposition of Lower Court

The lower court on April 2, 1992, thereafter ruled in favor of Allstate's Motion and granted the Motion. The court also awarded attorney's fees. (R. 59-60; Addendum 7).

D. Relevant Facts

In addition to the above-stated facts, the following additional facts are provided for this court's consideration.

1. No contract exists between Allstate Insurance Company, appellee, and Burns Chiropractic Clinic, appellant. (R. 7, 17).

2. Allstate has a personal indemnity automobile contract with Kelly Bailey. This contract is entitled: "Indemnity, Utah Automobile Policy." (R. 8, 18, 20, p. 1; Addendum 9).

3. Appellant Burns sued Allstate alleging Kelly Bailey assigned her rights under her personal indemnity automobile contract to appellant. (R. 2). The complaint does not state any particulars in regard to the assignment such as date, execution, delivery, place of execution, or notice to Allstate. (R. 1, 2, and 8). The assignment document was not attached to the complaint but was later attached to appellant's reply memorandum (although in the record it appears attached to an affidavit of Brian Burns). (R. 34, 37). The assignment itself only has a date on the assignment. The notary certificate is blank. (R. 34; Addendum 10).

4. The personal Indemnity Utah Automobile Policy between Allstate Insurance Company and Kelly Bailey specifically states the policy **cannot be transferred** to anyone without Allstate's consent. Kelly Bailey never obtained Allstate's consent to transfer any rights under the policy to Burns. (R. 20, p. 2, 8, and 18; Addendum 9). Neither appellant nor Kelly Bailey ever notified Allstate she had even entered into an assignment with appellant. (R. 37).

5. The personal Indemnity Utah Automobile Policy between Allstate Insurance Company and Kelly Bailey is very specific as to **unreasonable or unnecessary medical expenses** which may be incurred by an insured. The policy provides as follows:

If the insured person incurs medical expenses which are unreasonable or unnecessary, we may refuse to pay for those medical expenses and contest them. Unreasonable medical

expenses are fees for medical services which are substantially higher than the usual and customary charges for those services.

Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

If the insured person is sued by a medical services provider because **we** refuse to pay contested medical expenses, **we** will pay all defense costs and any resulting judgment against the insured person. **We** will choose the counsel. The insured person must cooperate with **us** in the defense of any claim of lawsuit.

(R. 20, p. 11, and 9; emphasis in original policy, Addendum 9).

6. Utah law also provides a method for resolution of a dispute of unreasonable or unnecessary medical expenses. Utah Code Ann. §31A-22-307(1)(a) and (2)(d) (1985 as amended) provides in pertinent part as follows:

(1) Personal injury protection coverages and benefits include:

(a) the **reasonable** value of all expenses for **necessary** medical . . . services. . .

(2)(d) In disputed cases, a court on its own motion or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of the claimant's medical services or expenses.

7. Pursuant to statute and pursuant to Utah Code Ann. §31A-22-307(2)(d) (1985 as amended), Allstate has consistently informed appellant that when a disagreement between Allstate and appellant arises as to the unreasonableness of expenses charged to its insureds or a question as to the necessity of certain chiropractic treatment, Allstate will follow the statute and submit the issue to a panel of three impartial physicians. (R. 9, 18, 49-50, and 59-60; Addendum 7 and 8).

8. Appellant does not dispute the availability of the medical panel. (Appellant's brief, p. 6; R. 49-50 and 59-60; Addendum 7 and 8).

9. In approximately May, 1991, Allstate received a bill from appellant for services it rendered to Kelly Bailey for a time period of February until May. Appellant did not state it had received an assignment from Kelly Bailey at the time it sent the bill. Allstate immediately sent a letter to Kelly Bailey indicating a medical utilization review of the claim was being conducted pursuant with the insurance contract with her to determine the reasonableness and necessity of the claimed charges of appellant. That letter further informed Kelly Bailey that no additional treatment may be covered; and past treatment, if not reasonable and not necessary, may also not be covered. (R. 38).

10. The total amount of chiropractic charges incurred by Kelly Bailey amounted to approximately \$4,200. Allstate was informed that the bulk of these charges were paid by the State of Utah's insurance company, Risk Management. (R.38).

11. Allstate Insurance Company submitted the charges to an independent agency which determined the charges were vastly overstated and unreasonable. (R.38)

12. The personal Indemnity Utah Automobile Policy between Allstate Insurance Company and Kelly Bailey contains numerous other rights and duties for which compliance is required to enforce the agreement between the parties. (R. 20; Addendum 9). The policy further states that Allstate **cannot be sued** under the policy unless full compliance has been made of all the policy terms. Burns cannot comply

with the terms of the policy because it is not a party to the personal contract. (R. 8, 9, and 20, p. 12; Addendum 9).

13. The assignment between appellant and Kelly Bailey also limits the assignment to the rights provided by the insurance contract. The assignment states:

Assignment of Rights: You are assigned to exclusive, irrevocable right to any cause of action that exists in my favor . . .

Demand for Payment: . . . (Y)ou are hereby tendered demand to pay . . to the extent such bills are payable under the terms of my/our policy for benefits. . . (R. 34; Addendum 10).

SUMMARY OF ARGUMENT

1. The insurance contract between Kelly Bailey and Allstate creates certain rights and duties between the parties to the contract. Appellant, by means of a separate independent assignment between Kelly Bailey and appellant of which Allstate is not a party, cannot acquire greater rights in the insurance contract than those existing between the parties to the insurance contract. An assignee stands in the shoes of an assignor and acquires no greater right. Accordingly, inasmuch as Kelly Bailey cannot sue Allstate directly when a dispute arises as to reasonable and necessary medical expenses, Burns cannot sue as well.

2. In order for a court to hear a dispute, sufficient facts must be alleged to establish the court's subject matter jurisdiction. Jurisdiction must appear from the facts in the record and cannot be inferred. Plaintiff's failure to allege sufficient facts to establish subject matter jurisdiction, especially in light of its untimely filing of memorandum which still did not allege sufficient facts for jurisdiction,

allows this court to affirm the lower court's dismissal.

3. Plaintiff's untimely filing of its reply memorandum, its untimely and improper ex parte communication to the Judge, containing additional arguments, should not be considered by this court, and the Order of Dismissal should be affirmed based upon the failure of the plaintiff to timely reply to arguments.

4. On two separate occasions, circuit courts have awarded Allstate attorney's fees against appellant for appellant's filing of a direct action against Allstate when the appellant did not have a legal basis for bringing the action. Likewise, pursuant to the Utah Rules of Appellate Procedure, Rule 33, this court should award attorney's fees to Allstate in having to defend against a frivolous appeal.

ARGUMENT

POINT I: THE LOWER COURT CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT ON THE BASIS APPELLANT IS BOUND BY THE TERMS OF THE CONTRACT BETWEEN ALLSTATE AND ITS INSURED, KELLY BAILEY.

Appellant's complaint alleges that pursuant to an assignment from Kelly Bailey, it can now sue Allstate directly for payment of health care services it provided to Kelly Bailey. This complaint was dismissed because the allegation, as a matter of law, fails to follow the insurance contract terms and basic assignment law.

A. An Assignee Stands in the Shoes of an Assignor and Acquires No Greater Rights.

Appellant comes to this court as an alleged assignee of certain rights under an insurance contract existing between Kelly Bailey and Allstate Insurance Company. If appellant has any rights at all under

that insurance contract, which is disputed, appellant, as a matter of law, cannot acquire greater rights than Kelly Bailey.

Basic assignment law states that an assignee acquires rights similar to the assignor but cannot create greater rights than the assignor. Fidelity Mutual Liability Insurance Co. v. Clark, 203 U.S. 64 (1906). "The familiar doctrine that an assignee of a nonnegotiable chose in action takes all the rights of his assignor . . . needs no citation of authority." Marsh v. Bowen, 6 A.2d 783 (PA 1939). As stated in Williston on Contracts, §404:

If it is said then that a chose in action is assignable, probably what is generally understood is, that the assignee acquires rights similar to those of the assignor, and is put in the same position with reference to those rights as that in which the assignor stood at the time of the assignment.

Id. at 5. Appellant's right to payment from Allstate for Kelly Bailey's chiropractic treatment is no greater than Kelly Bailey's right to payment from Allstate of those expenses.

B. The Right to Receive Payment for Medical Services Directly from Allstate must be with the Consent of Allstate.

The insurance contract between Kelly Bailey and Allstate specifically states that "(t)his policy can't be transferred to anyone without our written consent." (R. 20, p. 2; Addendum 9). Allstate never consented to Kelly Bailey assigning her right to reimbursement for reasonable and necessary health care services to Burns pursuant to the alleged assignment. Accordingly, appellant cannot assert any rights pursuant to the assignment between it and Kelly Bailey. Kelly Bailey has not complied with her insurance contract and obtained written consent from Allstate of a transfer to appellant of the right of

payment of reasonable and necessary medical expenses. Appellant cannot acquire greater rights than Kelly Bailey under the insurance contract; and, therefore, appellant has no right to payment from Allstate for reasonable and necessary medical expenses.

Non-assignability clauses in insurance contracts have been approved in other jurisdictions. The Court of Appeals in Colorado upheld a similar clause in Parrish v. Rocky Mountain Hospital & Medical Services Co., 754 P.2d 1180 (Colo App. 1988). In Parrish the plaintiff, also a chiropractor, treated many state employees. All of the employees had assigned to the chiropractor the right to payment or reimbursement to which the patients were entitled for his expenses of treatment of them. The defendant insured the employees. The contract between the defendant and the employees contained a non-assignability clause. The court in upholding the non-assignability clause stated:

The validity of non-assignable clauses in group health care contracts has been upheld in the courts of other states. . . . (cites omitted). In so holding, those courts have noted that the policy of free alienability of choses in action can be overcome by the strong policy of freedom of contract. **Further, the courts found that such non-assignment clauses in this type of contract are valuable tools in persuading health providers to keep their health care costs down.** We agree with this rationale; accordingly, we hold that the non-assignable clause is valid and enforceable and that the assignments relied on by plaintiff are void.

Id. at 1182, emphasis added.

Allstate never agreed to a transfer of any benefit of Kelly Bailey to Appellant Burns. Appellant cannot sue on an assignment that was not consented to under the insurance contract of Kelly Bailey with

Allstate. See also, Washington Hospital Center Corp. v. Group Hospitalization and Medical Services, Inc., 758 F. Supp. 750 (D.D.C. 1991), wherein court upheld the non-assignability clause on the rationale that such provisions helped constrain health care costs.

A reading of Allstate's insurance policy with Kelly Bailey clearly demonstrates that Allstate, also, is extremely concerned with rising health care costs. Not only does the contract include the non-assignability language, but the policy also specifically states that Allstate will only pay those expenses and services which are reasonable and necessary. Allstate's willingness to protect its insured against unreasonable and unnecessary medical expenses and treatment is further evidenced by its stance that if the insured is sued, Allstate will defend and pay if the verdict is adverse to the insured. Appellant asks this court to ignore the contract between Allstate and its insured and allow it to by-pass that contract and sue Allstate directly without compliance with the contract. The contract is specific and should be upheld.

This holding is likewise consistent with the Utah legislature's concern with rising medical expenses. Utah Code Ann. §31A-22-307 (1985 as amended) provides a specific statutory scheme to determine the reasonable value of necessary medical expenses including conducting relative value study of services and accommodations by the insurance commissioner. If a dispute still exists, subsection (2)(d) allows the parties to the dispute to submit the reasonableness of the claimant's medical services or expenses to an impartial medical panel. Upholding Allstate's policy of only paying for reasonable and necessary expenses is likewise consistent with the Utah legislature's statutory scheme.

C. Kelly Bailey Cannot Sue Allstate Directly for Unpaid Medical Expenses which are Unreasonable and Unnecessary.

Kelly Bailey under the insurance contract with Allstate has the right to receive payment for "all reasonable and necessary expenses incurred for necessary medical . . . services." (R. 20, p. 9; Addendum 9). If she incurs medical expenses which are unreasonable or unnecessary, Allstate has the right to refuse to pay for those expenses. Kelly Bailey, therefore, has the duty to avoid incurring unreasonable or unnecessary medical expenses. However, if those expenses are incurred, Allstate thereafter has the duty to defend Kelly Bailey if she is sued for payment of those expenses, and she has the duty to assist in that defense. These rights and duties are part of the contract between Kelly Bailey and Allstate.

Appellant Burns asks this court to set aside those conditions of the contract and grant it greater rights under the contract than Ms. Bailey, herself. Appellant Burns would ask this court to find that:

(1) Burns has been transferred **rights** of an Allstate insured by an Allstate insured (despite the non-assignability provision, *supra*); and,

(2) Despite the language in Allstate's policy that the contract rights cannot be transferred, the court ignores the contract language and allows Burns to somehow now acquire all of the insured's personal rights under the contract without any of the duties of the insured; and,

(3) Despite the language in the policy providing that if Allstate determined a medical provider's medical expenses are unreasonable and unnecessary, the medical provider can sue the insured, and Allstate

will provide the defense, appellant can now stand in larger shoes than the Allstate insured, and have the court vitiate that contract provision; and,

(4) The appellant can thereafter come to this court and still argue that despite all these violations of the personal contract between Kelly Bailey and Allstate, appellant still has the right to sue Allstate claiming full compliance has been made of the contract, even though Kelly Bailey cannot sue Allstate and assert full compliance with the contract.

This court simply should not grant such broad rights to appellant. The contract does not allow the suit by Kelly Bailey; appellant can have no greater rights.

Further, to permit the suit by appellant would effectively allow an insured and his medical provider to ignore the contract duties between Allstate and its insured. Allstate's desire to keep health care costs down and reasonable would be circumvented. A direct action suit against Allstate by Burns provides an easy way for Burns to ignore the policy and allows Burns to assist an insured in escaping his obligations under his insurance contract. One cannot assign away all his beneficial rights and thereby escape his duty. "This is sufficiently obvious when attention is called to it, for otherwise obligors would find an easy practical way of escaping their obligations." Williston on Contracts, §411, p. 19.

The appellant requests this court to allow it to sue Allstate directly, even though the insured cannot, for controversial medical expenses. A suit would thereby allow the insured to escape the duties under the policy. The policy simply does not provide the suit; an

insured cannot assign away his rights and duties and thereby cancel the contract such that now the assignee can bring the suit. Basic contract law provides otherwise. This court should uphold the lower court's ruling.

The appellant's own contract between itself and Kelly Bailey acknowledges the limitation of the assignment in its own language. It states:

Assignment of Rights: You are assigned to exclusive, irrevocable right to any cause of action that exists in **my** favor . . .

Demand for Payment: . . . (Y)ou are hereby tendered demand to pay . . . **to the extent** such bills are payable under the terms of my/our policy for benefits. . . (R. 34; Addendum 10).

Under the terms of its own contract with Kelly Bailey, the appellant is only assigned the rights of Kelly Bailey, not greater rights. Even if such a broad assignment was legal and enforceable, the assignment still does not grant the appellant greater rights than Kelly Bailey has in her contract with Allstate.

Affirmance of the dismissal by the lower court of this suit obviously does not extinguish any of appellant's rights. Appellant has several options available to it. The court will note that frequently other insurance providers (notably medical insurance providers) discount medical provider's bills to what is reasonable and necessary in the community. In those cases if a medical provider disagrees, he sues the patient to whom the services were provided, not the medical insurance provider. Allstate's policy merely has the same type of provision. The suit by appellant is properly against the person who had the contract with Burns, not her insurance company.

To this argument, the appellant means that it should not have to sue its own patient to recover money against Allstate. The appellant obviously has the remedy to that issue squarely within its grasp. Allstate has continually requested this matter, and other disputes over the reasonableness and necessity of medical expenses, be submitted to a medical panel. No suit ever need be filed. To stress the importance of this alternative and to stress the importance of not filing without a legal basis, attorney's fees should again be assessed against appellant.

D. Appellant's Case Law Simply Does not Control the Issue Before this Court.

The law cited by appellant is not on point to this current suit.

(1) The case of Burns v. State Farm, Case No. 914000013 involved a dispute over payments of reasonable medical expenses to a State Farm insured after State Farm had received notice of an assignment of contract benefit payments to Burns. Burns, in the Memorandum therein, admits its assignment is only to receive insurance proceeds to pay a bill and not a general assignment, contrary to its assertion in this case (R. 22, 31).

(2) The case of State Farm v. Farmers, 450 P.2d 458 (UT 1969) involves a question of whether a subrogation provision in a policy was valid and enforceable. The question involved was that "one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor." Id. at 458. While this case may have been applicable to Burns v. State Farm, no such application is present in this case. Appellant does not argue Kelly Bailey has been paid any money by Allstate. In fact, most of Burns' bill has been paid by Risk Management. (R. 38). The insured was not paid directly; no one has

been paid by Allstate since the large payment by Risk Management extinguished any reasonable and necessary charges of appellant. (R. 38). The case does help Allstate's position. In this case the Utah Supreme Court agrees that "a claim or cause of action for personal injuries arising out of tort is not assignable." Id. at 459. Likewise a personal contract rights and duties are not assignable under the facts in this case as per the contract.

(3) Ammerman v. Farmers, 450 P.2d 460 (UT 1969) did not deal with assignments but only with the issue of whether an insured had to pay a judgment to a judgment creditor prior to a suit against his carrier for bad faith.

The contract between Kelly Bailey and Allstate contains certain rights and duties. The contract provides that Kelly Bailey may direct the manner in which payments may be made if written consent is obtained by Allstate. However, as per the contract, she cannot assign her additional rights and duties thereunder. Further, even if Kelly Bailey could assign all of her rights and duties under her insurance contract to appellant, Burns by its own contract with Kelly Bailey and by law cannot acquire greater rights than Kelly Bailey. By contract, Kelly Bailey cannot sue Allstate directly and require it to pay unreasonable and unnecessary medical expenses; Burns likewise cannot. The lower court's decisions must be upheld.

The further nonsensical position of Appellant Burns becomes even more apparent when further language of the assignment and the insurance contract are compared. Under the insurance contract between Kelly Bailey and Allstate, the insured Bailey is to cooperate with Allstate in the defense of any claim or lawsuit brought against the

insured on the issue of unreasonable or unnecessary medical expenses. The insured's duty is, therefore, under the contract owed to her insurance carrier. The appellant Burns argues that the assignment to it relieves the insured of that duty in that under the assignment Ms. Bailey is now obligated to appellant to "cooperate, provide information as needed, and appear as needed, wherever to assist in the prosecution of such claims for benefits upon request." (R. 34; Addendum 10). Both contracts with the insured now have Ms. Bailey on each side of the fence. Appellant then asks this court to take this one step further and allow it to now be in the insured's shoes and argue receipt of the benefits from both contracts. The conflict is obvious. The appellant by its assignment cannot put it in the prized position of "having its cake and eating it, too." The assignment simply does not and cannot override the insurance contract. To find the suit by appellant valid, this court must also find that Ms. Bailey may testify against her own insurance carrier; and that Allstate, thereafter, cannot argue noncompliance with the express language of its policy requiring the insured to fully cooperate with Allstate in any suit against the insured.

POINT II: THE LOWER COURT CORRECTLY DISMISSED
PLAINTIFF'S COMPLAINT ON THE BASIS
APPELLANT'S COMPLAINT FAILS TO ESTABLISH
SUBJECT MATTER JURISDICTION

Even assuming a case against Allstate directly by Burns was allowable, Burns complaint must fail. The Utah Supreme Court has stated that "it is axiomatic that a tribunal's legal competence to hear a given claim and rule thereon is a fundamental prerequisite to all other considerations in the case." Utah Department of Business Regulation v. Public Service Commission, 602 P.2d 696, 698 (UT 1979). The appellant

must establish, therefore, by its pleadings that the court has subject matter jurisdiction over this matter. This appellant cannot do. The complaint does not have the requisite information to establish subject matter jurisdiction, and the lower court properly dismissed the complaint.

Appellant Burns based this direct cause of action on an alleged assignment. The complaint is silent as to the execution of the assignment, the delivery of the assignment, the date of the assignment, or any other facts necessary to determine if the suit was properly brought. The absence of allegations as to where this contract was consummated is fatally defective. Mayer v. Rankin, 91 Utah 193 (1936). As the court held in Mayer:

Both the original and the amended complaints are devoid of any allegation that the contracts of sale or any of them were consummated within this state. In the absence of such allegation, the complaints, and the various causes of action therein set out, are fatally defective.

Id. at 206.

The actual assignment, later filed, does not correct the complaint's defects. The only additional information found in the actual assignment is the date of the assignment. Other vital information necessary to establish jurisdiction is missing. Further concerns are raised about the assignment in that the notary certification is also left blank.

In matters relating to jurisdiction, the court cannot guess as to the facts necessary to establish jurisdiction. The facts must be stated in the pleadings in the record. As stated by the court in Jim Marrs Drilling Company, Inc. v. Woolard, 629 P.2d 810 (OK 1981):

In our case the record is silent as to where the contract of employment was made, accepted, or was to be performed. We believe that the burden of proof in this regard should be upon the party asserting jurisdiction. **Jurisdiction cannot be inferred but must affirmatively appear from the record.**

Id. at 812, emphasis in original, quoting from Crescent Corporation v. Martin, 443 P.2d 111 (OK 1968).

Inasmuch as the appellant has failed to set forth the necessary allegations to establish jurisdiction, the lower court properly dismissed the appellant's complaint.

The complaint is also fatally defective in that the complaint fails to allege that notice of the assignment was given to Allstate. An assignor or assignee is obligated to give notice to the alleged debtor to prevent payment to the wrong entity. Lackede Bank v. Schuler, 120 U.S. 511 (1887). No notice was given, and the complaint was properly dismissed.

POINT III: THE LOWER COURT'S DISMISSAL OF THE ACTION WAS PROPER GIVEN THE UNTIMELY RESPONSE OF APPELLANT TO ALLSTATE'S MOTION FOR SUMMARY JUDGMENT.

The Utah Code of Judicial Administration, Rule 4-501, deals with filing memoranda and documents with the court. In regard to a memorandum filed in opposition to a motion, the responding party "shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation." Id. at 4-501(1)(b). On February 10, 1992, Allstate filed a Motion to Dismiss with accompanying memorandum; the Motion was served by mail on February 7, 1992. No response was filed by the appellant until the day prior to the hearing scheduled by the court,

over one month after the Motion was served. Counsel for Allstate did not even receive a copy of that memorandum until half way through oral argument. The rule clearly was not followed.

Appellant thereafter contrary to the rules, submitted additional argument to the court through an ex parte letter directed to Judge McCleve. Allstate moved the lower court to disregard both the memorandum and the letter. The lower court granted the motion to dismiss in part on the basis both pleadings were untimely.

This court should likewise affirm the dismissal on the basis that said pleading and letter were submitted contrary to the Rules, and Allstate's Motion, as it would stand unopposed, should be granted.

POINT IV: PURSUANT TO THE UTAH RULES OF APPELLATE
PROCEDURE, RULE 33, ATTORNEY'S FEES SHOULD
BE AWARDED TO ALLSTATE.

Pursuant to Utah Code Ann. §78-27-56 (1953 as amended), the Second Circuit Court in Burns v. Allstate granted attorney's fees to Allstate on the basis that the action was without merit and not brought in good faith. The Third Circuit Court in the case of Burns v. Allstate, the case currently before this Court on appeal, held the action was without merit and not brought in good faith and likewise granted attorney's fees. The rationale, in part for both cases, was that the appellant simply did not have a legal basis for the lawsuit against Allstate in that the suit was contrary to current law; the complaints were jurisdictionally and procedurally incorrect; the appellant failed to timely respond to pleadings before the courts; and finally, the appellant had available a medical panel which could simply resolve the dispute pursuant to Utah Code Ann. §31A-22-307 (1985 as amended).

This feasible, statutorily provided alternative could be used by the appellant thereby resolving the dispute without the necessity of court intervention, thereby lessening the burden on the court system, and without the costs and expenses of litigation, including attorney's fees. This alternative had been requested by Allstate; refused by appellant which instead chose to require Allstate to appear and defend in a case which should have been resolved simply by submitting the matter to a medical panel. Based on these reasons, both courts ruled that appellant's actions warranted an award of attorney's fees. See also, Utah Rules of Civil Procedure, Rule 11, wherein attorney's fees are allowable for pleadings signed which are not well grounded in fact, not warranted by existing law, and interposed to harass or to needlessly increase the cost of litigation as another basis for the lower court's award of attorney's fees.

On appeal, this court can likewise award attorney's fees for a frivolous appeal. An frivolous appeal is defined as:

(O)ne that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief or other paper.

Id. at Rule 33(b), Definitions. Inasmuch as two lower courts have found the actions were brought without merit and not in good faith, this court should likewise find the appeal frivolous.

This court has previously held in the case of Utah Department of Social Services v. Adams, 806 P.2d 1193 (Utah Co. App. 1991) that if an appeal is taken from an action properly determined to be in bad

faith, the appeal is necessarily frivolous under Rule 33 of the Utah Rules of Appellate Procedure. The lower courts determined this action was brought without merit and in bad faith. Likewise, therefore, this court should rule the appeal frivolous and award attorney's fees. To date, attorney's fees for this appeal have been \$392 for preparation of the Motion for Summary Disposition and \$1,554 for legal research and preparation of the Brief of Appellee. Costs to date include copying costs of \$38 for the Motion for Summary Disposition and copying costs of \$91.80 for the Brief of Appellee. (Affidavit of Jan P. Malmberg, Addendum 11; previous filed affidavit of Jan P. Malmberg).

CONCLUSION

The Honorable Sheila K. McCleve properly dismissed appellant's complaint on the basis that the insurance contract between Allstate and Kelly Bailey does not allow an assignee, Appellant Burns, to acquire greater rights in the contract than the insured. The insured must follow the contract provisions in regard to determination of reasonable and necessary medical expenses. Appellant is likewise so bound.

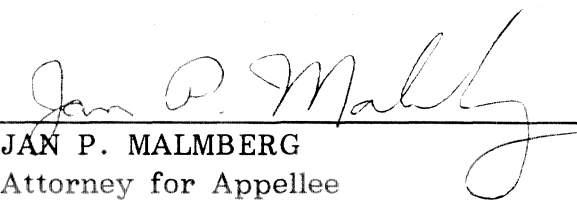
The lower court also properly dismissed appellant's complaint on the basis the complaint failed to allege sufficient facts to establish subject matter jurisdiction, especially in light of the lower court's proper ruling that plaintiff's memorandum and ex parte letter were untimely filed.

Finally, the lower court properly awarded attorney's fees against Appellant Burns for filing an action which was without merit and not brought in good faith. This award was based upon the lack of legal basis for the complaint; the untimely filed memorandum and ex parte

letter; and the availability of a fast, economical method of resolving this entire matter through the means of an impartial medical panel.

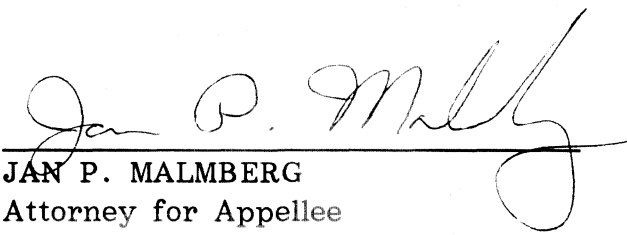
Allstate requests this Court to affirm the Order of Dismissal of the lower court and award attorney's fees of \$1,946 and costs of \$129.80, pursuant to the Utah Rules of Appellate Procedure, Rule 33, on the basis the appeal is likewise frivolous and not brought in good faith.

DATED this 24th day of September, 1992.


JAN P. MALMBERG
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1992, I hand-delivered four (4) copies of the foregoing Brief of Appellee to Richard J. Leedy, 424 Judge Building, #8 East Broadway, Salt Lake City, UT 84111.


JAN P. MALMBERG
Attorney for Appellee

ADDENDUM TO BRIEF

ADDENDUM -1-

Utah Code Ann. §31A-22-307 (1985 as amended)

History: C. 1953, 31A-22-306, enacted by
L. 1985, ch. 242, § 27; 1986, ch. 204, § 158.

COLLATERAL REFERENCES

A.L.R. — Combining or “stacking” of “no fault” or personal injury protection (PIP) cover- ages in automobile liability policy or policies, 29 A.L.R.4th 12.

31A-22-307. Personal injury protection coverages and benefits.

(1) Personal injury protection coverages and benefits include:

(a) **the reasonable value** of all expenses for necessary medical, surgical, X-ray, dental, rehabilitation (which includes prosthetic devices), ambulance, hospital, and nursing services, not to exceed a total of \$3,000 per person;

(b) (i) the lesser of \$250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss, except that this benefit need not be paid for the first three days of disability, unless the disability continues for longer than two consecutive weeks after the date of injury; and

(ii) a special **damage** allowance not exceeding \$20 per day for a maximum of 365 days, for services actually rendered or expenses reasonably incurred for services that, but for the injury, the injured person would have performed for his household, except that this benefit need not be paid for the first three days after the date of injury unless the person's inability to perform these services continues for more than two consecutive weeks;

(c) funeral, burial, or cremation benefits not to exceed a total of \$1,500 per person; and

(d) compensation on account of death of a person, payable to his heirs, in the total of \$3,000.

(2) (a) To determine the reasonable value of the medical expenses provided for in Subsection (1) and under Subsection 31A-22-309(1)(e), the commissioner shall **conduct a relative value** study of services and accommodations for the **diagnosis**, care, recovery, or rehabilitation of an injured person in the most populous county in the state to assign a unit value and determine the 75th percentile charge for each type of service and accommodation. Such study shall be updated every other year. In conducting the study, the department may consult or contract with appropriate public and private medical and health agencies or other technical experts. The costs and expenses incurred in conducting the relative value study shall be funded by the tax created under Section 59-9-105. Upon completion of the study, the department shall prepare and publish a relative value study which sets forth the unit value and the 75th percentile charge assigned to each type of service and accommodation.

(b) The reasonable value of any service or accommodation is determined by applying the unit value and the 75th percentile charge assigned to the service or accommodation under the relative value study. If a service or accommodation is not assigned a unit value or the 75th percentile

charge under the relative value study, the value of the service or accommodation shall equal the reasonable cost of the same or similar service or accommodation in the most populous county of this state.

(c) This subsection does not preclude the department from adopting a schedule already established or a schedule prepared by persons outside the department, if it meets the requirements of this subsection.

(d) In disputed cases, a court on its own motion or on the motion of either party may designate an impartial medical panel of not more than three licensed physicians to examine the claimant and testify on the issue of the reasonable value of the claimant's medical services or expenses.

(3) Medical expenses as provided for in Subsection (1)(a) and in Subsection 31A-22-309(1)(e) include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.

(4) This section does not prohibit the issuance of policies of insurance providing coverages greater than the minimum coverage required under this chapter nor does it require the segregation of those minimum coverages from other coverages in the same policy.

(5) Deductibles are not permitted with respect to the insurance coverages required under this section.

History: C. 1953, 31A-22-307, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 159; 1989, ch. 261, § 13; 1990, ch. 327, § 8.

Amendment Notes. — The 1989 amendment, effective April 24, 1989, rewrote Subsection (2), substituting "75th percentile charge" for "median charge" throughout and making other changes, deleted former Subsection (4),

relating to deductibles, renumbering former Subsection (5) as (4), and added Subsection (5).

The 1990 amendment, effective April 23, 1990, divided former Subsection (2) into present Subsections (2)(a) to (2)(d) and substituted "Deductibles are not permitted" for "An insurer may not offer policies that require deductibles" in Subsection (5).

ADDENDUM -2-

Utah Code Ann. §78-2a-3 (1953 as amended)

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

ADDENDUM -3-

Utah Code Ann. §78-27-56 (1953 as amended)

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

Amendment Notes. — The 1988 amendment, effective April 25, 1988, inserted the Subsection designation (1); deleted "where not otherwise provided by statute or agreement"

following "civil actions" in Subsection (1); substituted "shall" for "may" following "the court" in Subsection (1); added "except under Subsection (2)" at the end of Subsection (1) and added Subsection (2).

ADDENDUM -4-

Utah Rules of Civil Procedure, Rule 11

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended, effective Sept. 4, 1985.)

ADDENDUM -5-

Utah Rules of Appellate Procedure, Rule 33

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

ADDENDUM -6-

Utah Rules of Judicial Administration, Rule 4-501

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities, appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, all supporting documentation and a copy of the proposed order. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph 1(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five day period to file a reply memorandum, either party may notify the clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a

(2) **Motions for summary judgment.**

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) **Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraph (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the memorandum in support of or in opposition to the motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) the dispositive issues or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty days before the scheduled trial date. No dispositive motions shall be heard after that

(4) **Expedited dispositions.** Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) **Telephone conference.** The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990.)

ADDENDUM -7-

ORDER OF DISMISSAL
HONORABLE SHEILA K. MCCLEVE
THIRD CIRCUIT COURT

FILED

THIRD CIRCUIT COURT, STATE OF UTAH APR 01 1992

SALT LAKE COUNTY, SALT LAKE DEPARTMENT THE CIRCUIT COURT
SALT LAKE DEPARTMENT

BURNS CHIROPRACTIC CLINIC)	ORDER
)	
Plaintiff,)	Case No. 920001213
)	
v)	Judge Sheila K. McCleve
)	
ALLSTATE INSURANCE COMPANY)	
)	
Defendant.)	

Defendant's motion to dismiss Plaintiff's complaint is granted.

The contract language between Defendant Allstate and insured Kelly Bailey allows an insured to assign his reimbursement benefit for payment of reasonable and necessary medical expenses. It does not allow an assignee such as Burns Chiropractic Clinic to acquire or unilaterally assert greater rights than those for which the insured contracted. The contract language limits the insured to direct the manner of payment of benefits. The contract does not confer a broad power of general assignment. Plaintiff Burns Chiropractic Clinic is no less bound by the terms of the contract than the insured can be.

Further, the Plaintiff has failed to specify facts in the complaint that would establish subject matter jurisdiction. As Defendant argues, the alleged assignment is silent as to execution, delivery and place and the notary certificate is

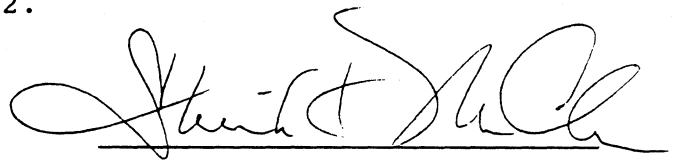
blank. The failure of Plaintiff to attempt to establish jurisdiction, particularly in light of Plaintiff's untimely filings of response memorandum and letter, is without excuse.

In addition, Plaintiff does not appear to dispute the availability of a medical panel which could resolve this matter pursuant to statute. And finally, this entire question has previously been brought before Second Circuit by the same Plaintiff against the same Defendant by way of a different insured and resolved in favor of the Defendant.

In view of all of the foregoing, it appears this action is without merit and has not been brought in good faith.

Accordingly, pursuant to Section 78-27-56 UCA, and based upon cost to defend as provided by Defendant's affidavits, Defendant is awarded \$400 in attorney's fees. Defendant's motion is granted and Plaintiff's case is dismissed.

Dated this 2nd day of April, 1992.

A handwritten signature in black ink, appearing to read "Frank M. [unclear]", written over a horizontal line.

CIRCUIT COURT JUDGE

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing Order was mailed, postage prepaid, to Richard J. Leedy, Attorney for Plaintiff, #8 East 300 South, Salt Lake City, UT 84111 and Jan P. Malmberg, Attorney for Defendant, 29 West 100 North, PO Box 364, Logan, UT 84321 this 3 day of April, 1992.



ADDENDUM -8-

MEMORANDUM OF DECISION
HONORABLE K. ROGER BEAN
SECOND CIRCUIT COURT

SECOND CIRCUIT COURT, STATE OF UTAH

DAVIS COUNTY, LAYTON DEPARTMENT

MEMORANDUM OF DECISION

BURNS CHIROPRACTIC CARE,
Plaintiff,

No. 914000383

vs.

Date 2-13-92

MICHAEL NUNES and ALLSTATE
INSURANCE,
Defendants

Judge Bean

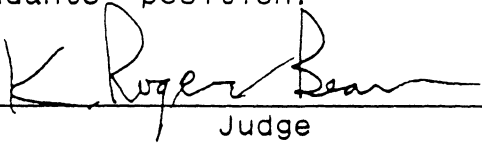
MATTER DEFENDANTS' MOTION FOR AWARD OF ATTORNEY FEES

At the hearing, Ms. Malmberg, representing Defendants, stated that Plaintiff and Defendants have been at loggerheads previously about whether Plaintiff has a cause of action against Defendants. She stated that the issue is the reasonableness of Plaintiff's charges, that Allstate and other carriers have declined to pay what Plaintiff is charging, that there is a medical board set up by statute for the express purpose of deciding such disputes, that Allstate has requested Plaintiff to take the dispute to that board, and that Plaintiff has declined to do so. Instead, although treatment was given to a third party patient, Plaintiff has been suing Defendants, asserting a direct cause of action against them.

Section 78-27-56, Utah Code, provides for the award of attorney fees to a prevailing party if the court determines that the action is without merit and not brought in good faith. Inasmuch as Plaintiff filed a dismissal in this case shortly before the hearing, the Court concluded that Plaintiff agreed with Defendants' position that the action was without merit. After hearing comment from both sides, the Court offered Plaintiff additional time to consult with counsel and respond, if it wished to do so, to Defendants' claim that the action also was not brought in good faith.

Plaintiff having made no response to Defendants' argument, the Court now determines that this action was without merit and not brought in good faith.

Ms. Malmberg asked for \$120 in attorney fees. She candidly stated she was traveling from Logan to Salt Lake in any event that day, and that she'd previously billed Defendants for \$60. The Court finds that \$120 is a reasonable attorney fee in these circumstances, and awards judgment for Defendants and against Plaintiff in that amount. The Court observes that even at the higher figure her request was most fair, since her billing rate is very modest and she was required to leave the freeway, come to this court, await the call of the case on the small claims calendar, and then present Defendants' position.



Judge

ADDENDUM -9-

INDEMNITY, UTAH AUTOMOBILE POLICY,
BETWEEN ALLSTATE AND KELLY BAILEY

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Allstate Indemnity Company
The Company Named In the Declarations
A Stock Company • Home Office • Northbrook, Illinois

GENERAL

This policy is a legal contract between **you** and **us**. A coverage applies only when a premium for it is shown on the declarations page. If more than one **auto** is insured, premiums will be shown for each **auto**. If **you** pay the premiums when due and comply with the policy terms, **Allstate**, relying on the information **you** have given **us**, makes the following agreements with **you**.

When And Where The Policy Applies

Your policy applies only during the policy period. During this time, it applies to losses to the **auto**, accidents, and occurrences within the United States of America, its territories or possessions, or Canada, or between their ports. The policy period is shown on the declarations page.

Insurance Coverage In Mexico

Auto accidents in Mexico are subject to the laws of Mexico — NOT the United States of America. In the Republic of Mexico an auto accident can be considered a CRIMINAL OFFENSE as well as a civil matter.

In some cases, the coverage under this policy may NOT be recognized by Mexican authorities and **we** may not be allowed to provide any insurance coverage at all in Mexico. For **your** protection, **you** should seriously consider purchasing **auto** coverage from a licensed Mexican insurance company before driving into Mexico.

However, when possible, protection will be afforded for those coverages for which a premium is shown on the declarations page for an insured **auto** while that **auto** is within 75 miles of the United States border and only for a period not to exceed ten days after each separate entry into the Republic of Mexico.

If loss or damage occurs which may require repair of the insured **auto** or replacement of any part(s) while the **auto** is in Mexico, the basis for adjustment of the claim will be as follows: any amount payable resulting from any loss or damage occurring in the Republic of Mexico shall be payable in the United States of America. **We** will not be liable for more than the cost of having the repairs or replacement parts made at the nearest point in the United States where the repairs or replacements can be made. The costs for towing, transportation and salvage operations of the **auto** while within Mexico are not covered under this policy.

Changes

Premium Changes

The premium for each **auto** is based on information **Allstate** has received from **you** or other sources. **You** agree to cooperate with **us** in determining if this information is correct, if it is complete, and if it changes during the policy period. **You** agree that if this information changes or is incorrect or incomplete, **we** may adjust **your** premium accordingly during the policy period.

Changes which result in a premium adjustment are contained in **our** rules. These include, but are not limited to:

-
1. **autos** insured by the policy, including changes in use.
 2. drivers residing in **your** household, their ages or marital status.
 3. coverages or coverage limits.
 4. rating territory.
 5. discount eligibility.

Any calculation or adjustment of **your** premium will be made using the rules, rates, and forms in effect, and on file if required, for **our** use in **your** state.

Coverage Changes

When **Allstate** broadens a coverage during the policy period without additional charge, **you** have the new feature if **you** have the coverage to which it applies. The new feature applies on the date the coverage change is effective in **your** state. Otherwise, the policy can be changed only by endorsement. Any change in **your** coverage will be made using the rules, rates, and forms in effect, and on file if required, for **our** use in **your** state.

Duty To Report Policy Changes

Your policy was issued in reliance on the information **you** provided concerning **autos** and persons insured by the policy. To properly insure **your auto**, **you** should promptly notify **us** when **you** change **your** address or whenever any **resident** operators insured by **your** policy are added or deleted.

You must notify **us** within 30 days when **you** acquire an additional or replacement **auto**. If **you** don't, coverage will not be afforded under this policy.

Combining Limits Of Two Or More Autos Prohibited

The limits of liability applicable to any one **auto** shown on the declarations page will not be combined with or added to the limits of liability applicable to any other **auto** shown on the declarations page or covered by the policy, even though a separate premium is charged for each of those **autos**, regardless of the number of:

1. vehicles or persons shown on the declarations page;
2. vehicles involved in the accident;
3. persons seeking damages as a result of the accident; or
4. insured persons from whom damages are sought.

If two or more **autos** are shown on the declarations page and one of these **autos** is involved in the accident, the limits of liability shown on the declarations page for the involved **auto** will apply. If none of the **autos** shown on the declarations page is involved in a covered accident involving an insured **auto**, the highest limits of liability shown on the declarations page for any one **auto** will apply.

Transfer

This policy can't be transferred to anyone without **our** written consent. However, if **you** die, coverage will be provided until the end of the policy period for:

1. **your** legal representative while acting as such, and
2. persons covered on the date of **your** death.

Provisional Premium

The coverages of this policy and the premium shown on the declarations page for these coverages have been established in accordance with the provisions of the Utah Insurance Code. If a court of competent jurisdiction declares or enters a judgment, from which there is no appeal, the effect of which is to render the provisions of such Code invalid or unenforceable in whole or in part, **Allstate** shall have the right to revise the affected coverages afforded by this policy. Also, **Allstate** shall have the right to recompute the premium payable for this policy.

Payment

If **your** payment of the initial premium amount due is by check, draft, or any remittance other than cash, such payment is conditional upon the check, draft, or other remittance being honored upon presentation. If such check, draft, or remittance is not honored upon presentation, this policy shall be deemed void from its inception. This means that **Allstate** will not be liable under this policy for any claims or damages which would otherwise be covered had the check, draft, or remittance been honored upon presentation.

Termination

If **we** offer to renew **your** policy and **your** required premium payment isn't received on or before the end of the then current policy period, **your** policy will terminate on the expiration date of the then current policy period.

Non-Renewal

If **we** don't intend to renew **your** policy, **we** will mail **you** notice at least 30 days before the end of the policy period.

Fraud or Misrepresentation

Your policy was issued in reliance on the information **you** provided on **your** auto insurance application concerning **autos** and persons insured by the policy. **You** agree that if **your** policy was obtained through material misrepresentation, fraud or concealment of material facts, or if any material misrepresentation was made on **your** auto insurance application, **Allstate** has the right to void or rescind **your** policy. If the policy is deemed void from its inception, **we** will return the premium paid.

Cancellation

You may cancel this policy by writing **us** the future date **you** wish to stop coverage.

Allstate may cancel part or all of this policy by mailing notice to **you** at **your** last known address. If **we** cancel because **you** didn't pay the premium, the date of cancellation will be at least 10 days after the date of mailing. If **we** cancel for any other reason, and the notice is mailed to **you** within the first 59 days of the policy period, the date of cancellation will be at least 10 days after the date of mailing. Otherwise, **we** will give **you** 30 days notice.

Proof of mailing the notice will be proof of notice. Any refund, if due, will be proportional to the time **your** policy has been in effect. Cancellation will be effective even if the refund is not made immediately.

After **your** policy has been in effect 59 days, **Allstate** won't cancel or reduce **your** coverage during the policy period unless:

1. **you** don't pay the premium when it's due;

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2. **you** or any other operator who either resides in **your** household or customarily operates the insured **auto** has had a driver's license suspended or revoked;
 3. the policy was obtained through material misrepresentation;
 4. there is a substantial change in the risk assumed by **us**;
 5. there are substantial breaches of contractual duties, conditions, or warranties; or
 6. **Allstate** has mailed **you** a notice of cancellation within the first 59 days.

Part I Automobile Liability Insurance Bodily Injury — Coverage AA Property Damage — Coverage BB
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Allstate will pay those damages an insured person is legally obligated to pay because of:

1. **bodily injury** sustained by any person; and
2. damage to or destruction of property.

Under these coverages, **your** policy protects an insured person from liability for damages arising out of the ownership, maintenance or use, loading or unloading of an insured **auto**.

We will defend an insured person sued as the result of a covered **auto** accident, even if the suit is groundless or false. **We** will choose the counsel. **We** may settle any claim or suit if **we** believe it is proper. **We** will not defend an insured person sued for damages which are not covered by this policy.

Additional Payments Allstate Will Make
When **we** defend an insured person under this part, **we** will pay:

1. up to \$50 a day for loss of wages or salary if **we** ask that person to attend hearings or trials to defend against a bodily injury suit. **We** won't pay for loss of other income. **We** will pay other reasonable expenses incurred at **our** request.
2. court costs for defense.
3. interest accruing on damages awarded. **We** will pay this interest only until **we** have paid, offered, or deposited in court the amount for which **we** are liable under this policy. **We** will only pay interest on

damages not exceeding **our** limits of liability.

4. premiums on appeal bonds and on bonds to release attachments, but not in excess of **our** limit of liability. **We** aren't required to apply for or furnish these bonds.

We will repay an insured person for:

1. the cost of any bail bonds required due to an accident or traffic law violation involving the use of the insured **auto**. **We** won't pay more than \$300 per bond. **We** aren't required to apply for or furnish these bonds.
2. any expense incurred for first aid to others at the time of an **auto** accident involving the insured **auto**.

Insured Persons

1. While using **your** insured **auto**:
 - a) **you**,
 - b) any **resident**, and
 - c) any other person using it with **your** permission.
2. While using a non-owned **auto**:
 - a) **you**, and
 - b) any **resident** relative using a private passenger **auto** or **utility auto**.
3. Any other person or organization liable for the use of an insured **auto** provided:
 - a) the **auto** is not owned or hired by the person or organization,
 - b) the use is by an insured person as defined under 1. or 2. above, and
 - c) **we** cover only the insured person's acts or omissions.

Insured Autos

1. Any **auto** described on the declarations page. This includes the private passenger **auto** or **utility auto** **you** replace it with.
2. An additional private passenger **auto** or **utility auto** **you** become the owner of during the policy period. This **auto** will be covered if **we** insure all other private passenger **autos** or **utility autos** **you** own. **You** must, however, tell **us** within 30 days of acquiring the **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if **we** are not notified of the additional **auto**.
3. A substitute private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, being temporarily used with the owner's permission while **your** insured **auto** is being serviced or repaired or if **your** insured **auto** is stolen or destroyed.
4. A non-owned private passenger **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of an insured person.
5. A trailer while attached to an insured **auto**. The trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a private passenger **auto** or **utility auto**.

Definitions

1. "**Allstate**", "**We**", "**Us**" or "**Our**" — means the company shown on the declarations page of the policy.

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2. **"Auto"** — means a land motor vehicle with at least four wheels designed for use principally upon public roads.
 3. **"Bodily Injury"** — means bodily injury, sickness, disease, or death.
 4. **"Resident"** — means a person who physically resides in **your** household and intends to continue residing there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
 5. **"Utility Auto"** — means an **auto** of the pick-up body, sedan delivery, or panel truck type. This **auto** must have a gross vehicle weight of 10,000 pounds or less, according to manufacturer's specifications.
 6. **"You"** or **"Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

Exclusions — What is not covered

Allstate will not pay for any damages an insured person is legally obligated to pay because of:

1. **bodily Injury** or property damage arising out of the use of **your** insured **auto** while used to carry persons or property for a charge, or any **auto** **you** are driving while available for hire by the public. This exclusion does not apply to shared-expense car pools.
2. **bodily Injury** or property damage arising out of auto business operations such as repairing, servicing, testing, washing, parking, storing, or selling of **autos**. However, coverage does apply to **you**, **resident** relatives, partners, or employees of the partnership of **you** or a **resident** relative when using **your** insured **auto**.
3. **bodily Injury** or property damage arising out of the use of a non-owned **auto** in any business or occupation of an insured person. However, this exclusion does not apply while **you**, **your** chauffeur, or domestic servant are using a private passenger **auto** or trailer.
4. **bodily Injury** to an employee of any insured person arising in the course of employment. This exclusion does not apply to **your** domestic employee who is not required to be covered by a workers compensation law or similar law.
5. **bodily Injury** to a co-worker injured in the course of employment. This exclusion does not apply to **you**.
6. **bodily Injury** or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by an insured person.
7. **bodily Injury** to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person resides in the same household as such insured, to the extent that the limits of liability for this coverage exceed the limits of liability required by the Utah Financial Responsibility of Motor Vehicle Owners and Operators Act.
8. damage to or destruction of property an insured person owns, transports, is in charge of, or rents. However, a private residence or a garage rented by that person is covered.

9. **bodily Injury** or property damage which would also be covered under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or any other such policy. This applies even if the limits of that insurance are exhausted.

10. **bodily Injury** or property damage arising out of the ownership, maintenance, or use of a motor vehicle with less than four wheels.

11. **bodily Injury** or property damage arising out of the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

Financial Responsibility

When this policy is certified as proof under any motor vehicle financial responsibility law, the policy will comply with the provisions of that law.

Limits of Liability

The limits shown on the declarations page are the maximum **we** will pay for any single accident involving an insured **auto**. The limit stated for each person for **bodily Injury** is **our** total limit of liability for all damages because of **bodily Injury** sustained by one person in any single accident involving an insured **auto**, including all damages sustained by anyone else as a result of that **bodily Injury**. Subject to the limit for each person, the limit stated for each accident is **our** total limit of liability for all damages for **bodily Injury** sustained by two or more persons in any single accident involving an insured **auto**. For property damage, the limit stated for each accident is **our** total limit of liability for

property damage sustained in any single accident involving an insured **auto**.

The liability limits apply to each insured **auto** as shown on the declarations page. The insuring of more than one person or **auto** under this policy will not increase **our** liability limits beyond the amount shown for any one **auto**, even though a separate premium is charged for each **auto**. The limits also won't be increased if **you** have other **auto** insurance policies that apply.

There will be no duplication of payments made under the Bodily Injury Liability and Uninsured Motorists Coverages of this policy.

An **auto** and attached trailer are considered one **auto**. Also, an **auto** and a mounted camper unit, topper, cap, or canopy are considered one **auto**.

If There Is Other Insurance

If an insured person is using a substitute private passenger **auto** or non-owned **auto**, **our** liability insurance will be excess over other collectible insurance. If more than one policy applies on a primary basis to an accident involving **your** insured **auto**, **we** will bear **our** proportionate share with other collectible liability insurance.

Assistance and Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement, and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for bail bonds or first aid to others.

Action Against Allstate

No insured person may sue **us** under this coverage unless there is full compliance with all the policy terms.

If liability has been determined by judgment after trial or by written agreement among the insured, the other person, and **us**, then whoever obtains this judgment or agreement against an insured person may sue **us** up to the limits of this policy. However, no one has the right to join **us** in a suit to determine legal responsibility.

Bankruptcy or Insolvency

The bankruptcy or insolvency of an insured person or that person's estate won't relieve **us** of any obligation.

Subrogation Rights

When **we** pay, an insured person's rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we** have paid. The insured person must protect these rights and help **us** enforce them.

Additional Interested Parties

If one or more additional interested parties are listed on the declarations, the Automobile Liability Insurance coverages of this policy will apply to the parties as insureds.

We will provide 10 days written notice to the additional interested party if **we** cancel or make any change to this policy which adversely affects that party's interest. **Our** notice will be considered properly given if mailed to the address shown on the declarations.

The naming of an additional interested party does not increase that party's rights to recovery under this policy, nor does it impose

an obligation for the payment of premiums under this policy.

What To Do In Case Of An Auto Accident Or Claim

If an insured person has an **auto** accident, **we** must be informed promptly of all details. If an insured person is sued as the result of an **auto** accident, **we** must be informed immediately.

Part II
Personal Injury Protection
Coverage VA

Allstate will pay to or on behalf of an **Injured person** the following benefits subject to the limits as specified in the Limits of Liability provision. Payments will be made only when **bodily Injury** is caused by an accident arising from the use of a **motor vehicle** as a **motor vehicle**.

1. Medical Expenses

All reasonable and necessary expenses incurred for necessary medical, surgical, X-ray, dental, rehabilitation services, including prosthetic devices, necessary ambulance, hospital, and nursing services, and any non-medical remedial care and treatment rendered in accordance with a recognized method of healing; however, it does not include expenses in excess of those for a semiprivate room unless more intensive care is medically required.

2. Work Loss

Loss of income and loss of earning capacity by the **Injured person** during his lifetime from inability to work during a period commencing three days after the date of the **bodily Injury** and continuing for a maximum of 52 consecutive weeks. If the **Injured person's** inability to work continues for more than a total of two consecutive weeks after the date of **bodily Injury**, the three day elimination period will not apply. Benefits end upon death of the **Injured person**.

3. Essential Services

Reasonable expenses incurred for services actually rendered or expenses incurred for services that, if he had not been injured, the **Injured person** would have customarily performed for his household. The allowance will commence three days after the date of the **bodily Injury** and continue for a maximum of 365 consecutive days. If the **Injured person's** inability to perform such services continues in excess of 14 consecutive days after the date of the **bodily Injury**, the three day elimination period will not apply. Benefits end upon death of the **Injured person**.

4. Funeral Expenses

Reasonable charges normally incurred for funeral, cremation or burial services.

5. Survivors' Loss

Compensation on account of the death of an **Injured person** payable to his or her heirs.

Definitions

1. "Allstate", "We", "Us" or "Our" — means the company shown on the declarations page of the policy.

2. "Bodily Injury" — means bodily injury, sickness, disease, or death.

3. "Injured Person" — means:

- (a) **you** or a **resident** relative who sustains **bodily Injury**:
 - (i) while in, on, getting into or out of a **motor vehicle**; or
 - (ii) when struck as a **pedestrian** by a **motor vehicle**.
- (b) any other person who sustains **bodily Injury**:
 - (i) while in, on, getting into or out

-
- of the **Insured motor vehicle**; or
(ii) when struck as a **pedestrian** by the **Insured motor vehicle** within the state of Utah.

4. **"Insured Motor Vehicle"** — means a **motor vehicle** with respect to which:
- (a) the bodily injury liability insurance of this policy applies and for which a specific premium is charged; and
 - (b) **you** are required to maintain security under the provisions of the Utah Financial Responsibility of Motor Vehicle Owners and Operations Act, Title 41 Chapter 12a.
5. **"Motor Vehicle"** — means any vehicle which is required to be registered with the Division of Motor Vehicles of the Utah Tax Commission under Title 41, 1-19, Utah Code Annotated 1953 as amended, but excluding motorcycles, trailers and semi-trailers as enacted by Utah Insurance Code 31A-22-302(2).
6. **"Pedestrian"** — means any person not in, on, getting into or out of, or riding upon a **motor vehicle**; excluding, however, any person riding upon a motorcycle or in, on, getting into or out of a trailer or semi-trailer.
7. **"Resident"** — means a person who physically resides in **your** household and intends to continue residing there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
8. **"You"** or **"Your"** — means the policyholder named in the declarations page and that policyholder's **resident** spouse.

Exclusions — What Is not covered

This coverage does not apply to **bodily**

Injury:

1. to **you** or a **resident** relative while in, on, getting into or out of any **motor vehicle** **you** own which is not an **Insured motor vehicle**.
2. to any person while operating the **Insured motor vehicle** without the expressed or implied consent of the insured or while not in lawful possession of the **Insured motor vehicle**.
3. to any **pedestrian**, other than **you** or a **resident** relative, when struck by an owned, but not **Insured motor vehicle**.
4. to any **pedestrian**, other than **you** or a **resident** relative, through the use of the **Insured motor vehicle** outside of the state of Utah.
5. to any person whose injury is self inflicted or is the result of an attempt to intentionally injure another person. If the injury is self inflicted and that person dies, Survivors' Loss benefits will not be paid.
6. to any person while committing a felony.
7. to any person resulting from the radioactive, toxic, explosive or other hazardous properties of nuclear materials.
8. to any person due to any act of war, insurrection, rebellion, or revolution.
9. to any person while in, on, getting into or out of a **motor vehicle** while located for use as a residence or premises.

-
10. to any person, other than **you** or a **resident** relative while in, on, getting into or out of any **motor vehicle** operated by, but not owned by **you**.

Limits of Liability

The limits of **our** liability for Personal Injury Protection are stated on the declarations page. These amounts are the maximum **Allstate** will pay per **Injured person** for any **motor vehicle** accident, regardless of the number of vehicles insured under this or other policies.

1. The maximum amount payable for Medical Expenses will not exceed the amount shown on the declarations. The first \$3,000 of medical expenses caused by an accident covered by this section can be incurred at any time. If the amount shown on the declarations page for Medical Expenses is greater than \$3000, any additional Medical Expenses must be incurred within three years of the date of the accident to be payable.
2. The maximum amount payable for Work Loss is eighty-five percent (85%) of any loss of gross income and earning capacity, not to exceed \$250 per week for a maximum of 52 consecutive weeks.
3. The maximum amount payable for Essential Services is \$20 per day for a maximum of 365 consecutive days for an **Injured person's** inability to perform services for his or her household.
4. The maximum amount payable for Funeral Expenses shall not exceed \$1,500.

5. The amount payable for Survivors' Loss is \$3,000, and is payable only to the **Injured person's** heirs.

6. Any amount payable by **Allstate** for Personal Injury Protection benefits will be reduced by the amount paid, payable, or required to be provided on account of such **bodily Injury**:

- (a) under any workers' compensation plan or similar statutory plan; or
- (b) by the United States or any of its agencies because of the **Injured person** being on active duty in the military services.

Unreasonable or Unnecessary Medical Expenses

If the insured person incurs medical expenses which are unreasonable or unnecessary, **we** may refuse to pay for those medical expenses and contest them. Unreasonable medical expenses are fees for medical services which are substantially higher than the usual and customary charges for those services.

Unnecessary medical expenses are fees for medical services which are not usually and customarily performed for treatment of the injury, including fees for an excessive number, amount, or duration of medical services.

If the insured person is sued by a medical services provider because **we** refuse to pay contested medical expenses, **we** will pay all defense costs and any resulting judgment against the insured person. **We** will choose the counsel. The insured person must cooperate with **us** in the defense of any claim or lawsuit. If **we** ask the insured person to attend hearings or trials, **we** will pay up to \$50 per day for loss of wages or salary. **We** will also pay other reasonable expenses incurred at **our** request.

Action Against Allstate

No one may sue **us** under this coverage unless there is full compliance with all the policy terms.

Notice To Allstate

As soon as possible, the **Injured person** or someone on that person's behalf must give **us** written notice of the accident. This notice must include the time, place and circumstances of the accident and the identity of the **Injured person**. If an **Injured person** or someone on that person's behalf sues a third party to recover damages from anyone believed responsible for the injury, a copy of the summons, complaint or other document must be sent to **us** as soon as possible.

Proof of Claim; Medical Reports

As soon as possible, the **Injured person** or someone on that person's behalf must give **us** written proof of claim. It must include all details **we** may need to determine the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The **Injured person** may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and other records pertinent to the claim.

Non-Duplication of Benefits; Priority of Payments; Other Insurance

No **Injured person** shall recover duplicate benefits for the same elements of loss under this or any other similar insurance including self-insurance. If two or more insurers or self-insurers are liable to pay personal injury protection benefits for the same elements of loss, the maximum benefit payable shall not exceed the highest limit of any one policy

providing benefits as required by the Financial Responsibility of Motor Vehicle Owners and Operators Act.

Primary personal injury protection coverage shall be provided by the policy insuring the **motor vehicle** occupied by the **Injured person** in use at the time of the accident. Excess personal injury protection coverage provided by this policy will be afforded when:

- (a) the benefits of the primary policy have been exhausted; and
- (b) the limits of this policy exceed the limits of the policy providing the primary coverage.

When two or more insurers are liable to pay personal injury protection benefits on the same level of priority, **Allstate** will not be liable for more than the proportion of **our** limit of liability under this coverage to the sum of **our** limit of liability of this coverage and that of any other applicable insurance for the same element of loss.

Any personal injury protection benefits payable by this policy with respect to **bodily Injury** sustained by an **Injured person**, while in, on, getting into or out of a **motor vehicle** being operated by, but not owned by **you**, shall be excess over any other collectible personal injury protection benefits, and any other automobile medical payments insurance, or any similar insurance.

Subrogation Rights

When **we** pay, an **Injured person's** rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we** have paid. However, **our** rights of recovery only apply if the **Injured person** has been fully compensated for the loss. The **Injured**

person must protect these rights and help **us** enforce them.

Reimbursement and Trust Agreement

When **we** pay any person under this coverage:

1. **we** are entitled to repayment of amounts paid by **us** out of the proceeds of any settlement that person recovers from any legally responsible party or insurer. **We** are not entitled to repayment until after the person **we** have paid under this coverage has been compensated for all damages which that person is legally entitled to recover.
2. all rights of recovery against any legally responsible party or insurer must be maintained and preserved for **our** benefit.

Our rights under this provision are subject to any applicable limitations provided in the Utah Insurance Code.

Assistance and Cooperation

When **we** ask, an insured person must cooperate with **us** in the investigation, settlement and defense of any claim or lawsuit. If **we** ask, that person must also help **us** obtain payment from anyone else who may be jointly responsible.

We can't be obligated if an insured person voluntarily takes any action or makes any payments other than for covered expenses for first aid to others.

Part III

Uninsured Motorists Insurance Coverage SS

Section I

Bodily Injury Caused By Uninsured Motorists

We will pay those damages which an insured person is legally entitled to recover from the owner or operator of an uninsured **motor vehicle** because of **bodily injury** sustained by an insured person. The **bodily injury** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured **motor vehicle**. **We** will not pay any punitive or exemplary damages.

If an insured person sues a person believed responsible for the accident without **our** written consent, **we** are not bound by any resulting judgment.

Insured Persons

1. **you** and any **resident** relative.
2. any other person while in, on, getting into or out of **your** insured **auto** with **your** permission.
3. any other person who is legally entitled to recover because of **bodily injury** to **you**, a **resident** relative, or an occupant of **your** insured **auto** with **your** permission.

An Insured auto is:

1. an **auto** described on the declarations page to which the bodily injury liability coverage of this policy applies. This includes the **auto** **you** replace it with. However, **you** must notify **us** within 30

days of the replacement **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if we are not notified of the replacement **auto**.

2. an **auto** **you** become the owner of during the policy period. This additional **auto** will be covered if **Allstate** insures all other private passenger **autos** **you** own. **You** must, however, tell us within 30 days after **you** acquire the **auto**. **You** must pay any additional premium. Coverage will not continue if **we** are not notified of the additional **auto**.
3. an **auto** not owned by **you** or a **resident** relative, if being temporarily used while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed. The **auto** must be used with the owner's permission. It can't be *furnished or available for the regular use of **you** or any **resident** relative.*
4. an **auto** not owned by **you** or a **resident** relative, if being operated by **you** with the owner's permission. The **auto** can't be furnished or available for the regular use of **you** or any **resident** relative.

An insured **auto** is not an **auto** made available for public hire by an insured person.

An uninsured motor vehicle is:

1. a **motor vehicle** which has no bodily injury liability bond or insurance policy in effect at the time of the accident.
2. a **motor vehicle** covered by a bond or insurance policy which doesn't provide at least the minimum financial security *requirements of the state in which **your** insured **auto** is principally garaged.*

3. a **motor vehicle** for which the insurer denies coverage, or the insurer becomes insolvent.

4. a hit-and-run **motor vehicle** which causes **bodily Injury** to an insured person. The identity of either the operator or owner of the hit-and-run vehicle must not be ascertainable. The accident must be reported within 24 hours to the proper authorities. **We** must be notified within 30 days.

If the hit-and-run **motor vehicle** causes the **bodily Injury** without physical contact with the insured person or the vehicle the insured person was occupying, then the insured shall show the existence of the other **motor vehicle** by clear and convincing evidence, which shall consist of more than the insured's *testimony*.

We shall have a right to inspect the insured **auto** or any **motor vehicle** the insured person was occupying at the time of the accident.

An uninsured motor vehicle is not:

1. an **auto** which is insured under Part 1 of this policy.
2. a **motor vehicle** that is lawfully self-insured.
3. a **motor vehicle** owned by any state, federal or local government or agency.
4. a **motor vehicle** or trailer operated on rails or crawler-treads.

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5. a farm-type tractor or equipment designed for use principally off public roads, except while actually on public roads.

Exclusions — What is not covered

Allstate will not pay any damages an insured person is legally entitled to recover because of:

1. **bodily Injury** to any person who makes a settlement without **our** written consent.
2. **bodily Injury** sustained while in, on, getting into or out of, or when struck by an uninsured **motor vehicle** which is owned by **you** or a **resident** relative.
3. **bodily Injury** if the payment would directly or indirectly benefit any workers' compensation or disability benefits insurer, including a self-insurer.
4. **bodily Injury** while in, on, getting into or out of a **motor vehicle** **you** own which is insured for this coverage under another policy.
5. **bodily Injury** sustained while in, on, getting into or out of, or while operating a **motor vehicle** which is not an insured **auto** but is owned by, furnished or available for the regular use of **you** or a **resident** relative.
6. any punitive or exemplary damages or related defense costs, regardless of any other provision of this policy.
7. **bodily Injury** arising out of an insured person's ownership, maintenance or use of a **motor vehicle** with less than four wheels.

8. **bodily Injury** arising from the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

Limits of Liability

The coverage limit shown on the declarations page for:

1. "each person" is the maximum that **we** will pay for damages arising out of **bodily Injury** to one person in any one **motor vehicle** accident, including all damages sustained by anyone else as a result of that **bodily Injury**.
2. "each accident" is the maximum that **we** will pay for damages arising out of **bodily Injury** to two or more persons in any one **motor vehicle** accident. This "each accident" limit is subject to the limit for "each person."

These limits are the maximum **Allstate** will pay for any one **motor vehicle** accident regardless of the number of:

1. claims made;
2. vehicles or persons shown on the declarations page; or
3. vehicles involved in the accident.

The Bodily Injury Caused By Uninsured Motorists limits apply to each insured **auto** as shown on the declarations page. This means the insuring of more than one person or **auto** under this or other auto policies will not increase **our** uninsured motorists limit of liability beyond the amount shown for any one **auto**. Coverage on any **auto** on this policy may not be stacked or added upon the coverage of any other **auto** on this policy

even though a separate premium is charged for each **auto**.

Subject to the above limits of liability, damages payable will be reduced by:

- a) all amounts paid by or on behalf of the owner or operator of an uninsured **motor vehicle** or anyone else responsible. This includes all sums paid under the bodily injury liability coverage or property damage liability coverage of this or any other auto policy.
- b) all amounts payable under any workers' compensation law, disability benefits law, or similar law, automobile medical payments insurance, or any similar personal injury protection coverage.

We are not obligated to make any payment for **bodily injury** under this coverage which arises out of an accident involving the use of an uninsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements.

Section II

Property Damage Caused By Uninsured Motorists

We will pay those damages that an insured person is legally entitled to recover from the owner or operator of an uninsured **motor vehicle** because of **property damage**. The **property damage** must be caused by accident and arise out of the ownership, maintenance or use of an uninsured **motor vehicle**. **We** will not pay any punitive or exemplary damages.

Property damage is covered only if:

- a) a separate limit is shown on the declarations page for Property Damage

- Caused By Uninsured Motorists;
- b) the accident causing the **property damage** involves actual physical contact between the insured **auto** and an uninsured **motor vehicle**;
- c) the owner, operator, or license plate number of the uninsured **motor vehicle** is identified; and
- d) the insured or someone on his behalf reports the accident within 10 days to **Allstate**.

The insured person or other person making claim for **property damage** must allow **us** to inspect any damaged property.

If an insured person sues a person believed responsible for the accident without **our** written consent, **we** are not bound by any resulting judgment.

Insured Persons

1. **you** and any **resident** relative.
2. any other person who is legally entitled to recover because of **property damage**.

An Insured auto is:

1. an **auto** described on the declarations page to which the bodily injury and property damage liability coverage of this policy applies. This includes the **auto you** replace it with. However, **you** must notify **us** within 30 days of the replacement **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if we are not notified of the replacement **auto**.
2. an **auto you** become the owner of during the policy period. This additional **auto** will be covered if **Allstate** insures all other private passenger **autos you** own. **You** must, however, tell **us** within

30 days after **you** acquire the **auto**. **You** must pay any additional premium. Coverage will not continue if **we** are not notified of the additional **auto**.

An insured **auto** is not an **auto** made available for public hire by an insured person.

An uninsured motor vehicle is:

1. a **motor vehicle** which is not covered under a liability policy at the time of the accident.
2. a **motor vehicle** covered by a bond or insurance policy which doesn't provide at least the minimum financial security requirements of the state in which **your** insured **auto** is principally garaged.
3. a **motor vehicle** for which the insurer denies coverage, or the insurer becomes insolvent.
4. a hit-and-run **motor vehicle** which causes **property damage** to the insured **auto** as a result of physical contact between the vehicles. **We** shall have a right to inspect the insured **auto** or any **motor vehicle** the insured person was occupying at the time of the accident.

An uninsured motor vehicle is not:

1. an **auto** which is insured under Part 1 of this policy.
2. a **motor vehicle** that is lawfully self-insured.
3. a **motor vehicle** owned by any state, federal or local government or agency.
4. a **motor vehicle** or trailer operated on rails or crawler-treads.

Exclusions — What is not covered

Allstate will not pay any damages an insured person is legally entitled to recover because of:

1. **property damage** to any insured **auto** when an insured person makes a settlement without **our** written consent.
2. **property damage** to any **auto you** own which is not insured for Property Damage Caused By Uninsured Motorists under this policy.
3. **property damage** which is paid or payable under any other property insurance.
4. **property damage** if the payment would directly or indirectly benefit any insurer of property.
5. any punitive or exemplary damages or related defense costs, regardless of any other provision of this policy.
6. **property damage** arising out of an insured person's ownership, maintenance or use of a **motor vehicle** with less than four wheels.
7. **property damage** arising from the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.

Limits of Liability

Allstate's limit of liability for Property Damage Caused By Uninsured Motorists is the lesser of:

1. the actual cash value of the insured **auto**;

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2. the amount necessary to repair or replace the insured **auto**; or
 3. the limit of liability shown on the declarations page for the insured **auto**.

Subject to the above limit of liability, damages payable will be reduced by:

1. all amounts paid by the owner or operator of the uninsured **motor vehicle**;
2. any deductible shown on the declarations page.

We are not obligated to make any payment for **property damage** under this coverage which arises out of an accident involving an uninsured **motor vehicle** until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been exhausted by payment of judgment or settlements.

Section III Common Provisions

Definitions

1. **"Actual Cash Value"** — means the current replacement cost of the property new reduced by an allowance for depreciation.
2. **"Allstate", "We", "Us" or "Our"** — means the company shown on the declarations page of the policy.
3. **"Auto"** — means a land **motor vehicle** with at least four wheels designed for use principally upon public roads.
4. **"Bodily Injury"** — means bodily injury, sickness, disease or death.

5. **"Depreciation"** — means the decrease in value of property due to age and wear-and-tear.

6. **"Motor Vehicle"** — means a land motor vehicle or trailer other than

- a) a vehicle or other equipment designed for use off public roads, while not upon public roads,
- b) a vehicle operated on rails or crawler-treads, or
- c) a vehicle while used as a residence or premises and not as a **motor vehicle**.

7. **"Property Damage"** — means damage to or destruction of the insured **auto** but does not include loss of use to the insured **auto** or damage to personal property contained in the insured **auto**.

8. **"Resident"** — means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.

9. **"You" or "Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

Non-Duplication of Benefits

No person will recover duplicate benefits for the same elements of loss under this or any other insurance, including approved plans of self-insurance.

Proof Of Claim; Medical Reports

As soon as possible, any person making claim must give **us** written proof of claim. It must include all details **we** may need to determine

the amounts payable. **We** may also require any person making claim to submit to questioning under oath and sign the transcript.

The insured person may be required to take medical examinations by physicians **we** choose, as often as **we** reasonably require. **We** must be given authorization to obtain medical reports and copies of records.

Assistance and Cooperation

We may require the insured person to take proper action to preserve all rights to recover damages from anyone responsible.

Legal Actions

No one may sue **us** under this coverage unless there is full compliance with all policy terms.

If, at any time before **we** pay for the loss, an insured person institutes a suit against anyone believed responsible for the accident, **we** must immediately be given a copy of the summons and complaint or other process. If a suit is brought without **our** written consent, **we** aren't bound by any resulting judgment.

If There Is Other Insurance

If the insured person was in, on, getting into or out of a vehicle which is insured for this coverage under another policy, coverage under this policy will be excess. This means that when the insured person is legally entitled to recover damages in excess of the other policy limit, **we** will pay only the amount by which the limit of liability of this policy exceeds the limit of liability of that policy.

If more than one policy applies to the accident on a primary basis, the total benefits payable will not exceed the maximum benefits

payable by the policy with the highest limit for uninsured motorists coverage. **We** will bear **our** proportionate share with other uninsured motorists benefits. This applies no matter how many **autos** or auto policies may be involved, whether written by **Allstate** or another company.

Trust Agreement

When **we** pay any person under this coverage:

1. **we** are entitled to repayment of amounts paid by **us** and related collection expenses out of the proceeds of any settlement or judgment that person recovers from any responsible party or insurer.
2. all rights of recovery against any responsible party or insurer must be maintained and preserved for **our** benefit.
3. insured persons, if **we** ask, must take proper action in their name to recover damages from any responsible party or insurer. **We** will select the attorney. **We** will pay all related costs and fees.

We will not ask the insured person to sue the insured of an insolvent insurer.

Payment Of Loss By Allstate

Any amount due is payable to the insured person, to the parent or guardian of an injured minor, or to the spouse of any insured person who dies. However, **we** may pay any person lawfully entitled to recover damages.

Subrogation Rights

When **we** pay, an insured person's rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we**

have paid. **You** must protect these rights and help **us** enforce them.

If We Cannot Agree

If the insured person and **we** don't agree on that person's right to receive any damages or the amount, then upon mutual consent, the disagreement will be settled by arbitration. Arbitration will take place under the rules of the American Arbitration Association.

If either party objects to the use of the rules of the American Arbitration Association, the following alternative method of arbitration will be used. The insured person will select one arbitrator. **We** will select another. The two arbitrators will select a third. If they can't agree on a third arbitrator within 30 days, the judge of the court of record in the county of jurisdiction where arbitration is pending will appoint the third arbitrator. The written decision of any two arbitrators will determine the issues. The insured person will pay the arbitrator that person selects. **We** will pay the one **we** select. The expense of the third arbitrator will be shared equally. However, attorney fees and fees paid to medical and other expert witnesses, are not considered arbitration expenses. These costs are paid by the party incurring them.

Regardless of the method of arbitration, any arbitration award will be binding and may be entered as a judgment in a proper court.

Part IV Protection Against Loss To The Auto

The following coverages apply when indicated on the declarations page. Additional payments, autos insured, definitions, exclusions, and other information applicable to all these coverages appear beginning on page 21.

COVERAGE DD

Auto Collision Insurance

Allstate will pay for direct and accidental loss to **your** insured **auto** (including insured loss to an attached trailer) from a collision with another object or by upset of that **auto** or trailer. The deductible amount won't be subtracted from the loss payment in collisions involving **your** insured **auto** and another **auto** insured by **us**.

COVERAGE HH

Auto Comprehensive Insurance

Allstate will pay for direct and accidental loss to **your** insured **auto** not caused by collision. Coverage includes but is not limited to loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, and riot or civil commotion. Glass breakage, whether or not caused by collision, and collision with a bird or animal is covered.

Allstate will pay up to \$2500 for loss to a **sound system** permanently installed in **your auto** by bolts, brackets, or other means, its antennas, or other apparatus in or on **your auto** used specifically with that system.

By agreement between **you** and **Allstate**, the deductible amount will not be subtracted from a glass breakage loss if the glass is repaired rather than replaced.

COVERAGE JJ

Towing and Labor Costs

Allstate will pay costs for labor done at the initial place of disablement of **your** insured **auto**. **We** will also pay for towing made necessary by the disablement. The total limit of **our** liability for each loss is shown on the declarations page.

COVERAGE UU

Rental Reimbursement Coverage

If **you** have either collision or comprehensive coverage under this policy and the loss involves either coverage, **Allstate** will repay **you** for **your** cost of renting an **auto** from a rental agency or garage. **We** will not pay more than the dollar amount per day shown on the declarations page. **We** won't pay mileage charges.

If **your** insured **auto** is stolen, payment for transportation expenses will be made under the terms of paragraph 3. of "Additional Payments Allstate Will Make." However, the limits for this coverage will apply if they exceed the limits stated under "Additional Payments Allstate Will Make."

If **your** insured **auto** is disabled by a collision or comprehensive loss, coverage starts the day after the loss. If it is drivable, coverage starts the day after the **auto** is taken to the garage for repairs.

Coverage ends when whichever of the following occurs first:

1. if the **auto** is disabled by a collision or comprehensive loss, completion of repairs or replacement of the **auto**;

2. if the **auto** is stolen, when **we** offer settlement or **your auto** is returned to use; or
3. thirty full days of coverage.

COVERAGE ZA

Sound System Coverage

Allstate will pay for loss to a **sound system** permanently installed in **your auto** by bolts, brackets or other means, its antennas or other apparatus in or on **your auto** used specifically with that system.

Coverage ZA applies only if comprehensive insurance is in effect under this policy.

Coverage ZA provides coverage for **sound systems** in excess of the coverage provided under comprehensive insurance (Coverage HH). The limit of **our** liability is shown on the declarations page.

COVERAGE ZZ

Tape Coverage

Allstate will pay for loss to any tapes or similar items used with any **auto sound systems**. Coverage applies to tapes or similar items **you** or a **resident** relative own that are in or on **your** insured **auto** at the time of loss. The total limit of **our** liability for each loss is shown on the declarations page.

This coverage applies only if **you** have comprehensive insurance under this policy. Coverage ZZ makes tapes or similar items insured property under **your** comprehensive insurance.

Additional Payments Allstate Will Make

1. **Allstate** will pay up to \$200 for loss of clothing and personal luggage, including its contents, belonging to **you** or a **resident** relative while it is in or upon **your** insured **auto**. This provision does

not apply if the insured **auto** is a **travel-trailer**.

This coverage applies only when:

- a) the loss is caused by collision and **you** have purchased collision insurance.
 - b) the entire **auto** is stolen, and **you** have purchased comprehensive insurance.
 - c) physical damage is done to the **auto**, clothing and luggage caused by earthquake, explosion, falling objects, fire, lightning, or flood and **you** have purchased comprehensive insurance.
2. **Allstate** will repay **you** up to \$10 for the cost of transportation from the place of theft or disablement of **your** insured **auto** to **your** destination, if
- a) the entire **auto** is stolen and **you** have comprehensive insurance under this policy.
 - b) the **auto** is disabled by a collision or comprehensive loss, and **you** have the coverage under this policy applicable to the loss.

This provision does not apply if the insured **auto** is a **travel-trailer**.

3. If **you** have comprehensive insurance under this policy, **Allstate** will repay up to \$10 a day but not more than \$300 for each loss for the cost of transportation when the entire **auto** is stolen. This coverage begins 48 hours after **you** report the theft to **us**, and ends when **we** offer settlement or **your** **auto** is returned to use.
4. If **you** have purchased collision or comprehensive insurance under this policy, **Allstate** will pay general average

and salvage charges imposed when **your** insured **auto** is being transported.

Insured Autos

1. Any **auto** described on the declarations page. This includes the private passenger **auto** or **utility auto** **you** replace it with if **you** notify **Allstate** within 30 days of the replacement and pay the additional premium. Coverage will not continue after 30 days if **we** are not notified of the replacement **auto**.
2. An additional private passenger **auto** or **utility auto** **you** become the owner of during the policy period. The **auto** will be covered if **Allstate** insures all other private passenger **autos** or **utility autos** **you** own. **You** must, however, tell **us** within 30 days of acquiring the **auto**. **You** must pay any additional premium. Coverage will not continue after 30 days if **we** are not notified of the additional **auto**.
3. A substitute private passenger **auto** or **utility auto**, not owned by **you** or a **resident**, temporarily used with the permission of the owner while **your** insured **auto** is being serviced or repaired, or if **your** insured **auto** is stolen or destroyed.
4. a non-owned private passenger **auto** used by **you** or a **resident** relative with the owner's permission. This **auto** must not be available or furnished for the regular use of **you** or any **resident**.
5. A trailer while attached to an insured **auto**. This trailer must be designed for use with a private passenger **auto** or **utility auto**. This trailer can't be used for business purposes with other than a

private passenger **auto** or **utility auto**. Home, office, store, display, or passenger trailers are not covered. **Travel-trailers** or **camper units** are not covered unless described on the declarations page.

Definitions

1. **"Allstate", "We", "Us" or "Our"** — means the company shown on the declarations page of the policy.
2. **"Auto"** — means a land motor vehicle with at least four wheels designed for use principally on public roads.
3. **"Camper Unit"** — means a demountable unit designed to be used as temporary living quarters, including all equipment and accessories built into and forming a permanent part of the unit. A camper unit does not include:
 - a) caps, tops or canopies designed for use as protection of the cargo area of a **utility auto**; or
 - b) radio or television antennas, awnings, cabanas, or equipment designed to create additional off-highway living facilities.
4. **"Resident"** — means a person who physically resides in **your** household with the intention of continuing residence there. **Your** unmarried dependent children while temporarily away from home will be considered residents if they intend to resume residing in **your** household.
5. **"Sound System"** — means any device within the insured **auto** designed for:
 - a) voice or video transmission, or for voice, video or radar signal reception; or
 - b) recording or playing back recorded material; or
- c) supplying power to cellular or similar telephone equipment.
6. **"Travel-trailer"** — means a trailer of the house, cabin or camping type equipped or used as a living quarters.
7. **"Utility Auto"** — means an **auto** of the pick-up body, sedan delivery or panel truck type. This **auto** must have a gross vehicle weight of 10,000 pounds or less, according to manufacturer's specifications.
8. **"You" or "Your"** — means the policyholder named on the declarations page and that policyholder's **resident** spouse.

Exclusions — What Is not covered

These coverages don't apply to:

1. loss which may reasonably be expected to result from the intentional or criminal acts of **you** or any **resident**, or any other person using the insured **auto** with **your** permission or which is in fact intended by that person.
2. any **auto** used for the transportation of people or property for a fee. This exclusion does not apply to shared-expense car pools.
3. any damage or loss resulting from any act of war, insurrection, rebellion or revolution.
4. loss to any non-owned **auto** used in auto business operations such as repairing, servicing, testing, washing, parking, storing or selling of **autos**.
5. loss due to radioactive contamination.

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6. damage resulting from wear and tear, freezing, mechanical or electrical breakdown unless the damage is the burning of wires used to connect electrical components, or the result of other loss covered by this policy.
 7. tires unless stolen or damaged by fire, malicious mischief or vandalism. Coverage is provided if the damage to tires occurs at the same time and from the same cause as other loss covered by this policy.
 8. loss, other than collision, to any **sound system** within **your auto** including any apparatus in or on the **auto** designed for use with that system.

If **you** have purchased Coverage HH, this exclusion will not apply to any **sound system** up to the limit stated in Coverage HH for **sound systems**. Losses in excess of the limit for loss to **sound systems** provided under Coverage HH will be covered if **you** have purchased Coverage ZA.
 9. loss to any tapes or similar items, unless **you** have purchased Coverage ZZ under this policy.
 10. loss to a **camper unit** whether or not mounted. This exclusion will not apply if the **camper unit** is described on the declarations page.
 11. loss to appliances, furniture, equipment and accessories that are not built into and forming a permanent part of a **travel-trailer**.

12. loss to **your travel-trailer** while rented to anyone else unless a specific premium is shown on the declarations page for the rented vehicle.
13. any loss arising out of the participation in any prearranged or organized racing or speed contest or in practice or preparation for any contest of this type.
14. loss due to conversion or embezzlement by any person who has the vehicle due to any rental, lien, or sales agreement.

Right To Appraisal

Both **you** and **Allstate** have a right to demand an appraisal of the loss. Each will appoint and pay a qualified appraiser. Other appraisal expenses will be shared equally. The two appraisers, or a judge of a court of record, will choose an umpire. Each appraiser will state the actual cash value and the amount of loss. If they disagree, they'll submit their differences to the umpire. A written decision by any two of these three persons will determine the amount of the loss.

Payment Of Loss By Allstate

Allstate may pay for the loss in money, or may repair or replace the damaged or stolen property. **We** may, at any time before the loss is paid or the property is replaced, return at **our** own expense any stolen property, either to **you** or at **our** option to the address shown on the declarations page, with payment for any resulting damage. **We** may take all or part of the property at the agreed or appraised value. **We** may settle any claim or loss either with **you** or the owner of the property.

Limits Of Liability

Allstate's limit of liability is the actual cash value of the property or damaged part of the

property at the time of loss. The actual cash value will be reduced by the deductible for each coverage as shown on the declarations page. However, **our** liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality. The limit for loss to any covered trailer not described on the declarations page is \$500.

An **auto** and attached trailer are considered separate **autos**, and **you** must pay the deductible, if any, on each. Only one deductible will apply to an **auto** with a mounted **camper unit**. If unmounted, a separate deductible will apply to the **auto** and **camper unit**.

When more than one coverage is applicable to the loss, **you** may recover under the broadest coverage but not both. However, Coverage ZA, if purchased, will provide coverage in excess of the limit for loss to **sound systems** provided under Coverage HH.

If There Is Other Insurance

If there is other insurance covering the loss at the time of the accident, **we** will pay only **our** share of any damages. **Our** share is determined by adding the limits of this insurance to the limits of all other insurance that applies on the same basis and finding the percentage of the total that **our** limits represent.

When this insurance covers a substitute **auto** or non-owned **auto**, **we** will pay only after all other collectible insurance has been exhausted.

When this insurance covers a replacement **auto** or additional **auto**, this policy won't apply if **you** have other collectible insurance.

Action Against Allstate

No one may sue **us** under these coverages unless there is full compliance with all the policy terms.

Subrogation Rights

When **we** pay, **your** rights of recovery from anyone else for damages **we** have paid become **ours** up to the amount **we** have paid. **You** must protect these rights and help **us** enforce them.

Loss Payable Clause

If a lienholder is shown on the declarations page, **we** may pay loss under this policy to **you** and to the lienholder as its interest may appear. The lienholder's interest will not be voided by:

1. any act or neglect of the owner of the **auto**; or
2. any change in title or ownership of the **auto** if the lienholder notifies **us** within 10 days.

If **you** do not pay the premium when due, the lienholder must, at **our** request, pay the premium; otherwise **we** cancel this policy.

The lienholder must notify **us** of any known increase in hazard. The lienholder must pay, at **our** request, the premium for any increase in hazard; otherwise this policy will be void.

We may cancel this policy according to its terms. Cancellation will also be effective with respect to the lienholder's interest. **We** may also cancel this clause of the policy. In either event, **we** will provide 10 days notice to the lienholder. **Our** mailing of notice will be proof of notice.

If **you** do not submit proof of loss within the time specified in this part, the lienholder must do so within 60 days. Proof of loss must be submitted in the form and manner specified below. The lienholder will be subject to provisions relating to appraisal, time of payment, and bringing suit.

When **we** make payment to the lienholder for loss under this policy, **we** will be subrogated to the rights of the party **we** pay, to the extent of **our** payment. When **we** pay a lienholder for a loss for which **you** are not covered, **we** are entitled to the lienholder's right of recovery against **you** to the extent of **our** payment. **We** have the option to pay the lienholder the entire amount due or which will become due on the mortgage or other security agreement with interest and receive full assignment and transfer of the mortgage or security agreement. **Our** right to subrogation will not impair the lienholder's right to recover the full amount of its claim.

What You Must Do If There Is A Loss

1. As soon as possible, any person making claim must give **us** written proof of loss. It must include all details reasonably required by **us**. **We** have the right to inspect the damaged property. **We** may require any person making claim to file with **us** a sworn proof of loss. **We** may also require that person to submit to examinations under oath.
2. Protect the **auto** from further loss. **We** will pay reasonable expenses to guard against further loss. If **you** don't protect the **auto**, further loss is not covered.
3. Report all theft losses promptly to the police.

IN WITNESS WHEREOF **Allstate** has caused this policy to be signed by its Secretary and its President at Northbrook, Illinois, and if required by state law, this policy shall not be binding unless countersigned on the declarations page by an authorized agent of **Allstate**.


Secretary


President

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ADDENDUM -10-

ASSIGNMENT BETWEEN BURNS
AND KELLY BAILEY

To Brian D. Burns, D.C.
dba BURNS CHIROPRACTIC CLINIC

ASSIGNMENT OF BENEFITS

The undersigned patient and/or responsible party, in addition to continuing personal responsibility, and in consideration of treatment rendered or to be rendered assigns to the physician or facility named above the following rights, power, and authority:

RELEASED INFORMATION: You are authorized to release and to permit the examination or copying of any of my medical records, x-rays, laboratory reports, and the results of all tests of any type or character to such person(s) as the physician and/or facility deems appropriate.

ASSIGNMENT OF RIGHTS: You are assigned to exclusive, irrevocable right to any cause of action that exists in my favor against any insurance company or other person or entity to the extent of your bill for total services, including the exclusive, irrevocable right to receive payment for such services, make demand in my name for payments, and prosecute and receive penalties, interest, court costs, or other legally compensable amounts owed by an insurance company or other person or entity. I, as the patient and/or responsible party, further agree to cooperate, provide information as needed, and appear as needed, wherever to assist in the prosecution of such claims for benefits upon request. The physician and/or facility is also assigned the exclusive, irrevocable right to request and receive from any insurance company or health care plan any and all information and documents pertaining to my policies including a copy of such policy, and any information or supporting documentation concerning or touching upon the handling, calculation, processing, or payment of any claim.

DEMAND FOR PAYMENT: To any insurance company providing benefits of any kind to me/us for treatment rendered by the physician/facility named above, you are hereby tendered demand to pay in full the bill for services rendered by the physician/facility named above following your receipt of such bill for services to the extent such bills are payable under the terms of my/our policy for benefits, less any amounts which I/we owe personally which are not payable under the terms of your policy.

THIRD PARTY LIABILITY: If patient(s) treatments for injuries are the result of the negligence of any third party, then patient(s) grant a lien against any recovery from such third party(s) to the extent of the bills for treatment in favor of the physician/facility named above.

STATUTE OF LIMITATIONS: Patient(s) waive the right to claim any Statute of Limitations regarding claims for services rendered or to be rendered by the physician/facility named above.

ATTORNEY'S FEES: Patient(s) agrees to pay for reasonable costs of collection (Both pre and post judgement) including attorney fees and court costs for services rendered by the Physician/facility named above

LIMITED POWER OF ATTORNEY: I hereby grant to the physician/facility named above power to endorse my name upon any checks, drafts, or other negotiable instrument representing payment from any insurance company representing payment for treatment and health care rendered by physician/facility. I agree that any insurance payment representing an amount in excess of the charges for treatment rendered will be credited to my/our account or forwarded to my/our address upon request in writing to the physician/facility named above.

In the event that any provision of this Agreement is determined to be invalid or unenforceable, all other provisions of this Agreement shall remain enforceable.

A PHOTOCOPY OF THIS INSTRUMENT SHALL SERVE AS ORIGINAL

Signatures of Patients and Responsible party:

1. Kelly Bailey Date Feb 7, 91
Sign Here 2. _____ Date _____
3. _____ Date _____

STATE OF UTAH

Before me this day personally appeared to person(s) whose signature(s) appear above who by me being duly sworn upon oath say(s) that the statements set forth above are true and correct. Subscribed and sworn before me this _____ day of _____ 19____
Notary Public Salt Lake County, Utah

NOTARY PUBLIC

My commission expires ____/____/____

ADDENDUM -11-

AFFIDAVIT OF JAN P. MALMBERG

Jan P. Malmberg, #4084
PERRY, MALMBERG & PERRY
Attorney for Defendant
Allstate Insurance Company
29 West 100 North
P. O. Box 364
Logan, UT 84321
(801) 753-5331

IN THE UTAH COURT OF APPEALS

BURNS CHIROPRACTIC CLINIC,)	AFFIDAVIT OF JAN P.
)	MALMBERG
Plaintiff and Appellant,)	
)	
vs.)	
)	
ALLSTATE INSURANCE COMPANY,)	Appellate Court
)	No. 920282 CA
Defendant and Appellee.)	

STATE OF UTAH)
 : ss
County of Cache)

Comes now, Jan P. Malmberg, attorney for the defendant,
being first duly sworn, deposes and says:

1. I am the attorney for the defendant and make this
affidavit upon personal knowledge and belief.

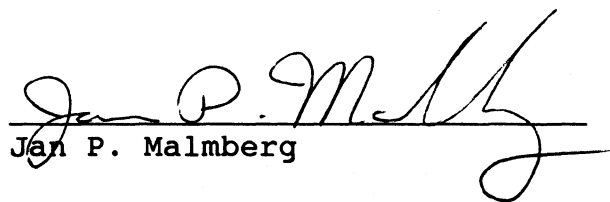
2. My preparation of the Brief of Appellee necessitated
legal research, drafting of pleadings, and review of the
factual and legal basis for said brief. The total amount of
time spent in preparing this matter has been 25.9 hours.

3. My hourly fee is \$60 per hour. This amount is
reasonable for comparable legal services.

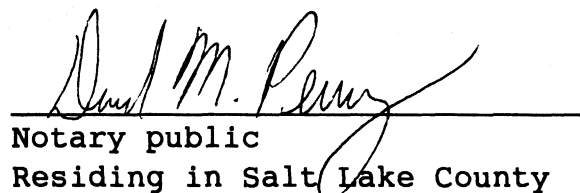
4. A reasonable award for attorney's fees would be \$1,554 for preparation of the Brief of Appellee and \$392 for preparation of the Motion for Summary Disposition.

5. Copying costs have been \$38 for the Motion for Summary Disposition and copying costs of \$91.80 for the Brief of Appellee.

Dated this 24th day of September, 1992.


Jan P. Malmberg

Subscribed and sworn to before me this 24th day of September, 1992.


Notary public
Residing in Salt Lake County

My commission expires:

